89-928

No. _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., and CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Petitioners,

—v.—

THE UNITED STATES and ROBERT A. MOSBACHER, SR., SECRETARY OF COMMERCE,

Respondents,

CEMENTOS ANAHUAC DEL GOLFO, S.A., CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V., and CEMENTOS VERACRUZ, S.A. DE C.V.,

Petitioners,

—v.—

THE UNITED STATES and ROBERT A. MOSBACHER, SR., SECRETARY OF COMMERCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Federal Circuit Court of Appeals erred in allowing a countervailing duty to be imposed on imports from Mexico without first requiring the International Trade Commission to make an "injury determination" in accordance with the treaty provisions of the General Agreement on Tariffs and Trade ("GATT") and federal law.

LIST OF PARTIES AND RULE 28.1 LIST

PARTIES:

Petitioners

Cementos Guadalajara, S.A.
Cementos Portland Nacional, S.A.
Cementos Veracruz, S.A.
Cementos Anahuac del Golfo, S.A.
Cementos de Chihuahua, S.A.
Cementos Guadalajara, S.A. de C.V.
Cementos Mexicanos, S.A. de C.V.
Cementos Portland Nacional, S.A. de C.V.
Cementos Veracruz, S.A. de C.V.

Respondents

United States of America
Robert A. Mosbacher, Sr., Secretary of Commerce

RULE 28.1 LIST

The corporate parents of Petitioners are:

Cementos Guadalajara, S.A., and Cementos Guadalajara, S.A. de C.V.—Cegusa, S.A.
Cementos Portland Nacional, S.A. and Portland Nacional, S.A. de C.V.—Empressas Tolteca de Mexico, S.A. de C.V.
Cementos Veracruz, S.A., and Cementos Veracruz, S.A. de C.V.—Apasco, S.A. de C.V.
Cementos Anahuac del Golfo—Cementos Anahuac, S.A. de C.V.
Cementos Mexicanos, S.A.—Cementos Monterrey, S.A.

In addition, affiliates of Petitioners are:

Cementos Maya, S.A., a wholly-owned, publicly held subsidiary of CEMSA, S.A.
Cementos Tolteca, S.A., a wholly-owned, publicly held subsidiary of Tolmex, S.A.
Cementos Apasco, S.A., a wholly-owned, publicly held subsidiary of Holderbank Financiere Glaris, S.A.

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IN THE

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No. _____

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., and CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Petitioners,

—v.—

THE UNITED STATES and ROBERT A. MOSBACHER, SR., SECRETARY OF COMMERCE,

Respondents,

CEMENTOS ANAHUAC DEL GOLFO, S.A., CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V., and CEMENTOS VERACRUZ, S.A. DE C.V.,

Petitioners,

—v.—

THE UNITED STATES and ROBERT A. MOSBACHER, SR., SECRETARY OF COMMERCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above entitled proceedings on July 13, 1989.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Federal Circuit is reported at 879 F.2d 847; it is reprinted in Appendix A hereto at pages A-1 to A-3.

The opinion of the United States Court of International Trade in *Cementos Anahuac del Golfo, S.A.* v. *United States* (*"Anahuac I"*), CIT No. 86-01-00082, is reported at 687 F. Supp. 1558; it is reprinted in Appendix B hereto at pages B-1 to B-21, along with the order of the court at pages B-21 to B-22. The opinion of the United States Court of International Trade in *Cementos Guadalajara, S.A.* v. *United States* (*"Guadalajara"*), CIT No. 86-12-01525 is reported at 686 F. Supp. 335; it is reprinted in Appendix B at pages B-23 to B-58, along with the judgment of the court at page B-59. The opinion of the United States Court of International Trade in *Cementos Anahuac del Golfo, S.A.* v. *United States* (*"Anahuac II"*), CIT No. 86-12-01607 is reported at 689 F. Supp. 1191; it is reprinted in Appendix B hereto at pages B-60 to B-108, along with the judgment of the court at page B-109.

JURISDICTION

The judgment of the court of appeals (App. A, *infra* at A-3) was entered on July 13, 1989. A petition for rehearing and suggestion for rehearing en banc were denied on September 12, 1989 and October 19, 1989, repectively. (Appendix C hereto at pages C-2 to C-5). The Federal Circuit entered an order on December 4, 1989, continuing the injunction against Customs and ITA liquidating the subject entries with countervailing duty assessments pending the filing and disposition of the present certiorari petition. (Appendix C hereto at page C-6 to C-7).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

Section 303(a)(1) and (a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303(a)(1) and (a)(2), are set forth in Appendix D hereto, at page D-1.

Section 701 of the Tariff Act of 1930, as amended by § 101 of the Trade Agreements Act of 1979, 19 U.S.C. § 1671, is set forth in Appendix D hereto, at pages D-1 to D-2.

Section 772(d)(1)(D) of the Tariff Act of 1930, as amended by § 101 of the Trade Agreements Act of 1979, 19 U.S.C. § 1677a(d)(1)(D), is set forth in Appendix D hereto, at page D-3.

Article VI, paragraph 5 of the General Agreement on Tariffs and Trade, Part II, 61 Stat. (5) and (6), T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947), is set forth in Appendix E hereto, at page E-1.

STATEMENT OF THE CASE

These actions involve challenges to orders entered in December, 1985, and December, 1986, by the Department of Commerce, International Trade Administration ("ITA") directing the Commissioner of Customs to impose countervailing duties on otherwise duty-free imports of Mexican portland hydraulic cement and cement clinker entered into the United States during calendar years 1983 and 1984. The gravamen of the complaints is that ITA is without authority to enter such an order against a Contracting Party to the General Agreement on Tariffs and Trade ("GATT") unless the International Trade Commission ("ITC") has first made an affirmative determination that the imported products are a cause of injury to a United States industry. *See* Section 303(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303(a)(2).

Mexico has been a "country under the Agreement" within the meaning of Section 701 of the Tariff Act, as amended, 19 U.S.C. § 1671, since April 23, 1985,[1] and a Contracting Party to the GATT since August 24, 1986. It is undisputed that the ITC has never made a determination of injury to a U.S. industry by reason of these imports from Mexico. The Government insists that such a determination is not needed for issuance of an order imposing countervailing duties against GATT Contracting Parties if, as here, the products in question entered the country prior to the date that Mexico became a "country under the Agreement."

The United States Court of International Trade ("CIT") divided on the question. In *Anahuac I*, the CIT, per Judge Aquilino, decided that, in the absence of an affirmative injury determination by the ITC, cement imported from Mexico in 1983 was not lawfully subject to a countervailing duties' assessment imposed after the date that Mexico acquired party-status under GATT. Appendix B at pages B-1 to B-22. In *Guadalajara* and *Anahuac II*, the CIT, per Judge Carman, upheld the 1986 ITA orders imposing countervailing duties on cement products imported from Mexico on two separate occasions in 1984, notwithstanding the lack of an ITC injury determination. Appendix B at pages B-23 to B-109.

At the center of the dispute is the intended meaning of the word "imposed" as used in Section 303(a)(2). Judge Carman accepted the argument that "[t]he point of reference for the

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1 On April 30, 1985, the Office of the United States Trade Representative published the following:

> The Government of the United Mexican States has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.
>
> In accordance with section 701(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1671(b)), as of April 23, 1985, Mexico is a "country under the Agreement."

Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18335, 18335-36 (1985).

requirement of an injury determination before imposition of countervailing duties appears to correspond to the time when the goods are entered or imported into the United States, not when the duties are finally assessed after a 751 review." Appendix B at page B-54. The contrary view takes the statute to mean what it says: that countervailing duties are not to be "imposed" on otherwise duty-free imports from a GATT member-country until such time as a determination of injury has been made by the ITC, no matter how much earlier the goods actually entered the United States. *Anahuac I*, Appendix B at pages B-9 to B-10.

On appeal to the Court of Appeals for the Federal Circuit, *Guadalajara/Anahuac II* and *Anahuac I* were briefed and argued separately, but were consolidated for decision. A panel of the court below sided with the Government, concluding that countervailing duties could be imposed against Mexico, without first making an injury determination, even after Mexico had acceded to the GATT, because the imported products entered the country before Mexico acquired most-favored-nation status under the treaty. The panel did not issue its own opinion but chose instead to rely on the CIT opinions in *Gualalajara* and *Anahuac II*. Appendix A at pages A-1 to A-3.

Petitioners here filed with the Federal Circuit a petition for rehearing with a suggestion for rehearing en banc. The rehearing was denied on September 12, 1989 and the suggestion was declined on October 19, 1989. The instant petition for a writ of certiorari followed in timely fashion.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's failure to require an injury determination within the meaning of Section 303 of the Tariff Act misconstrues the statute, abrogates international obligations of the United States under the GATT and conflicts with judicial precedent and settled agency practice.

The Federal Circuit decision is in error, conflicts with judicial precedent and long-standing administrative practice and is inconsistent with international obligations of the United States under the GATT. If not reviewed and overturned by this Court, the precedent will cause lasting confusion here and abroad regarding the United States' tariff policies on goods imported from GATT trading partners. The character of the issue presented places it within the exclusive jurisdiction of the Federal Circuit and thus leaves petitioners, or those who may find themselves similarly situated, without recourse to obtain relief elsewhere. It is therefore imperative that certiorari be granted in this case and that the error below be corrected so as to insure that it will not be perpetuated by the Federal Circuit.

Section 303(a)(2) is relatively straightforward. It was added to the Tariff Act of 1930 by § 331 of the Trade Act of 1974 to bring non-dutiable items under the countervailing duty laws,[2] and to align the legislative coverage with international treaty obligations pertaining to antidumping and countervailing duties under the GATT. The new provision requires as to "any imported article or merchandise which is free of duty" that "an affirmative determination" of injury be made "by the [International Trade] Commission" before "duties may be *imposed*

2 Prior to 1974, the countervailing duty law, under § 303 of the Tariff Act of 1930, only applied to dutiable items and did not provide for an injury determination. Under the "grandfather clause" of the GATT—which allows countries to retain in force pre-existing countervailing duty laws inconsistent with GATT—there was no obligation on the United States to apply an injury test before assessing countervailing duties on dutiable items.

under this section." 19 U.S.C. § 1303(c)(2) (1976) (emphasis added).[3]

The legislative history makes clear the purpose of the new subsection. As stated in the Senate Report accompanying the bill that was ultimately enacted:

> Under this provision, no additional duty could be imposed with respect to any duty-free article unless there is a determination by the International Trade Commission . . . that a domestic producer of like or directly competitive articles is being or is likely to be injured, or is prevented from being established by reason of importation of said article.

S. Rep. No. 1298, 93rd Cong., 2d Sess. 185 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7320.

With regard to Congress' interest in conforming the legislation to outstanding treaty obligations, the Senate Report was unambiguous: "The inclusion of an injury standard is appropriate in light of the general countervailing duty rule in Article VI of the GATT which requires a finding of injury before such duties may be levied on subsidized product imports." *Id.* In this connection, the pertinent language of the GATT to which the legislation has reference could not be clearer:

> [N]o contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or

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3 In 1979, Congress enacted the Trade Agreements Act, which added a new title to the Tariff Act of 1930, Title VII: Countervailing and Antidumping Duties, 19 U.S.C. §§ 1671 through 1677g. The new section 701 of the Tariff Act provided the procedures to be followed with respect to the imposition of countervailing duties on imports from countries under the GATT. 19 U.S.C. § 1671. (*See* App. D-1 and D-2, *infra*). Old section 303 continued to have application for both dutiable and non-dutiable items imported from countries not under the Agreement. 19 U.S.C. § 1303, except that the procedures to be followed with respect to the imposition of countervailing duties were to be as provided in new Title VII.

> subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry.

Article VI, paragraph 5, General Agreement on Tariffs and Trade, 61 Stat. (5) and (6), T.I.A.S. No. 1700, 55 U.N.T.S. 182. Moreover, the meaning of the term "levy" is explicitly spelled out; thus the GATT Subsidies Code provides: "As used in the Agreement 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax." See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT, Article 4, paragraph 4, note 2, 31 U.S.T. 513, T.I.A.S. No. 9619 (effective January 1, 1980).

Notwithstanding these mutually reinforcing statutory and treaty commands, the ITA, without first securing an injury determination from the ITC, directed the Commissioner of Customs to levy countervailing duties against imported Mexican cement products in three separate orders entered after Mexico became a country entitled to most-favored-nation treatment under GATT.[4] To be sure the cement products subject to these assessment orders entered the United States before Mexico acceded to GATT membership. But neither Section 303(a)(2) of the Tariff Act nor Article VI of the GATT attach any importance to the date of entry of imported products. It is rather the date on which the countervailing duty is actually "imposed"

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4 That the act of liquidation pursuant to the ITA orders in question is "the definitive or final legal assessment • • • of a duty • • •" within the meaning of GATT Subsidies Code is not a matter of dispute. As the CIT pointed out in *Guadalajara*, at the time the goods entered the country, petitioners "only deposited estimated countervailing duties on this merchandise." Appendix B at page B-57. It added, "[n]o actual assessed countervailing duties have been imposed on these entries" until publication of the ITA assessment order following the 751 review. *Id.* Indeed, it is only after publication of that final assessment order that an interested party to a 751 review is entitled by statute to seek judicial review of the actual assessment in the CIT. *See* 28 U.S.C. § 1516(a)(2)(B)(ii).

(19 U.S.C. § 1303(a)(2))—*i.e.*, the date of "levy" (GATT, Article VI, paragraph 5)—that is legally significant.[5]

This is precisely the position of the Department of Commerce, the ITA and the CIT in connection with an adjustment of antidumping duties—which are the subject of Section 772(d)(1)(D) of the same Tariff Act—for "the amount of any countervailing duty *imposed* on the merchandise * * * *under Section 303.*" 19 U.S.C. § 1677a(d)(1)(D) (emphasis added). For such purposes:

> Commerce interprets the word "imposed" as used in 19 U.S.C. § 1677a(d)(1)(iv) and 19 C.F.R. § 353.10(d)(1)(iv) to include countervailing duties only when they are "actually imposed" or "assessed". Commerce state[s] that this interpretation, which excludes deposits of estimated countervailing duties, is of consistent and longstanding practice.

Serampore Industries Pvt. Ltd. v. *United States Department of Commerce*, 675 F. Supp. 1354, 1359 (CIT 1987).

Serampore cannot be squared with the decision below. If the term "imposed" under Section 303 has as its reference point the time when countervailing duties are finally assessed or actually levied for purposes of adjusting the amount of antidumping duties due on the same goods—as *Serampore* holds—so, too, must the same term in the same statutory provision have the

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5 There is thus no merit to the argument that petitioners are seeking "retroactive relief" by insisting upon an ITC injury determination before a final assessment of countervailing duties can be made on these subsidized imports. *See* Appendix B at page B-50 to B-51. To the contrary, petitioners seek only the treatment to which the GATT and Congress say they are entitled by virtue of being a "country under the Agreement" at the time that the United States actually levies countervailing duties on the subject Mexican cement products. Both the treaty and the statute specify that, if (as here) the exporting country is entitled to most-favored-nation treatment at the time the duty is imposed, an injury determination must be made with regard to "*any* imported article on merchandise which is free of duty" (19 U.S.C. § 1303(a)(2) (emphasis added))—without regard to when that imported article may have actually entered the United States.

same reference point for all other valuation purposes—as the CIT held in *Anahuac I*.[6] To this end, Judge Aquilino's conclusion in *Anahuac I* bears repeating:

> [L]iability for such an impost is distinct from the mechanism (and timing) of its assessment . . . . While the prescribed tariff is determined at the date of entry, the same cannot be said with regard to the rate of any additional countervailing duty. Indeed, determination of the presence of a bounty and of particularized benefit therefrom post-dates the moment of entry, and that administrative process is governed by the law existent then. To repeat, during the course of the *ex post facto* analysis of the entries herein, Mexico's status changed in such a way [*i.e.*, by Mexico becoming a 'country under the Agreement'] as to require a different administrative approach—in accordance with the applicable law of the United States.

Appendix B at pages B-9 to B-10.

In sum, at the time a final assessment of countervailing duties was made with respect to the subsidized imports involved here, Mexico was undeniably a "country under the [GATT] Agreement" and therefore "a determination of injury is required by the international obligations of the United States" within the

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6 That the term "imposed" was intended to have the same meaning in both § 303(a)(2) and § 772(d)(1)(D) of the Tariff Act was made clear by Congress. Both § 303(a)(2) and the predecessor to § 772(d)(1)(D) had their genesis in the Trade Act of 1974. In § 321(b) of the Trade Act of 1974, Congress provided that imported merchandise could not be subject to both antidumping and countervailing duties; thus antidumping duties would be adjusted by the amount of countervailing duties determined to be owing. As the amount of countervailing duties is determined only after an investigation is completed, this adjustment can only be made when countervailing duties are actually imposed. The enactment of § 772(d)(1)(D) in the 1979 Trade Agreements Act simply clarified this point. H.R. Doc. No. 153, 96th Cong., 1st Sess. 412, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 683; S. Rep. No. 249, 96th Cong., 1st Sess. 94, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 480.

meaning of Section 303(a)(2). By holding that such an injury determination could be avoided because the Mexican goods entered the United States years earlier, the Federal Circuit committed fundamental error, set itself against judicial precedent (as reflected in *Serampore*) that looks to the time of "levy" not the time of "entry" as the telling reference point, and contradicted an agency interpretation of the statutory term "impose" of "consistent and longstanding practice." *Serampore*, *supra*, 675 F. Supp. at 1359. Without a grant of certiorari and plenary review by this Court, the error will go uncorrected and the conflict and confusion will persist.

CONCLUSION

Accordingly, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit to permit review of its opinion and judgment, and then to reverse the judgment below and enter judgment for Petitioners.

December 8, 1989

Respectfully submitted,

Joseph S. Kaplan*
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

88-1400, -1476

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., and CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiffs-Appellants,

—v.—

THE UNITED STATES and MALCOLM BALDRIDGE, SECRETARY OF COMMERCE,

Defendants-Appellees.

88-1502

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff-Appellee,

CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V. and CEMENTOS VERACRUZ, S.A. DE C.V.,

Plaintiffs,

—v.—

THE UNITED STATES and WILLIAM VERITY, SECRETARY OF COMMERCE,

Defendants-Appellants,

GIFFORD HILL & COMPANY, INC. and
KAISER CEMENT CORPORATION,

Defendants.

DECIDED: July 13, 1989

Before:
RICH, NIES, and NEWMAN, *Circuit Judges.*

PER CURIAM.

These appeals are from conflicting final judgments of the Court of International Trade in three actions brought by exporters of portland hydraulic cement and cement clinker from Mexico. In each of the three actions, the exporters challenged the authority of the United States to impose countervailing duties on Mexican cement entered during the later part of 1983 and in all of 1984. Although the actions were distinct (due to different dates of entry and different exporters), the exporters' arguments in each action were substantially identical.

In 88-1400, a group of Mexican exporters appeal the first decision of the Court of International Trade, *Cementos Guadalajara, S.A.* v. *United States*, 686 F. Supp. 335 (CIT 1988), in which Judge Carman awarded judgment to the United States, permitting the United States to impose countervailing duties on entries made during calendar year 1984.

In 88-1502, a second group of Mexican exporters appeal the second decision of the Court of International Trade, *Cementos Anahuac del Golfo, S.A.* v. *United States*, 687 F. Supp. 1558 (CIT 1988), in which Judge Aquilino, in response to substantially the same arguments the first group of exporters made to Judge Carman, awarded judgment to the second group of exporters and enjoined the United States from imposing countervailing duties on entries made between July 1, 1983, and December 31, 1983.

In 88-1476, a third group of Mexican exporters appeal the third decision of the Court of International Trade, *Cementos Anahuac del Golfo, S.A.* v. *United States*, 689 F. Supp. 1191 (CIT 1988), in which Judge Carman again awarded judgment to the United States, permitting the United States to impose countervailing duties on entries made during calendar year 1984.

Our jurisdiction is under 28 U.S.C. § 1295(a)(5) (1982). We *affirm* the judgment in number 88-1400 on the basis of Judge Carman's opinion, *Cementos Guadalajara, S.A.* v. *United States*, 686 F. Supp. 335 (CIT 1988), which we adopt. Similarly, we *affirm* the judgment in 88-1476 on the basis of Judge Carman's opinion, *Cementos Anahuac del Golfo, S.A.* v. *United States*, 689 F. Supp. 1191 (CIT 1988), which we adopt, except for the portions, not appealed, which discuss whether the methodology used by the United States to compute subsidies was correct and whether the United States was required to use a country-wide subsidy rate rather than a company-specific subsidy rate. 689 F. Supp. at 1214-16. We *reverse* the judgment in 88-1502 because it is based upon reasoning and analysis which conflicts with Judge Carman's opinions which we have adopted.

COSTS

Each party shall bear its own costs.

AFFIRMED AS TO 88-1400 and 88-1476

REVERSED AS TO 88-1502

APPENDIX B

Slip Op. 88-58

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 86-01-00082

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff,

—and—

CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V. and CEMENTOS VERACRUZ, S.A. DE C.V.,

Intervenor-Plaintiffs,

—v.—

UNITED STATES, and MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

Defendants,

—and—

GIFFORD HILL & COMPANY, INC. and KAISER CEMENT CORPORATION,

Intervenor-Defendants.

Opinion & Order

[Motions of plaintiff and intervenor-plaintiffs for judgment upon the agency record granted in part and denied in part; remanded to International Trade Administration.]

Decided: May 12, 1988

Rogers & Wells (*Eugene T. Rossides* and *Robert E. Ruggeri*) for the plaintiff.

Willkie Farr and Gallagher (*Walter J. Spak, Jeffrey W. Carr* and *Robert A. Peterson*) for intervenor-plaintiff Cementos de Chihuahua, S.A.

O'Connor & Hannan (*Andrew Jaxa-Debicki*) for intervenor-plaintiffs Cementos Guadalajara, S.A. de C.V., Cementos Mexicanos, S.A. de C.V., Cementos Portland Nacional, S.A. de C.V. and Cementos Veracruz, S.A. de C.V.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Horgan*); and Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Craig L. Jackson*) for the defendants.

Squire, Sanders & Dempsey (*Ritchie T. Thomas, William D. Kramer* and *William A. Henry*) for the intervenor-defendants.

AQUILINO, Judge: This case seeks revocation of an order of the International Trade Administration, U.S. Department of Commerce *sub nom. Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed.Reg. 43,063 (Sept. 21, 1983), in the aftermath of the agency's first administrative review thereunder.

Background

The history of that determination, wherein the International Trade Administration ("ITA") concluded that "certain benefits which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930 . . . are being provided to

manufacturers, producers, or exporters in Mexico of portland hydraulic cement and cement clinker"[1], is set forth in the thorough opinion in *Cementos Guadalajara, S.A. v. United States*, 12 CIT ____, Slip Op. 88-48 (April 27, 1988), *appeal filed* May 4, 1988, and will not be repeated here.

Pursuant to 19 U.S.C. § 1675, the ITA conducted the first review of its countervailing-duty ("CVD") order for the period July 1 through December 31, 1983. However, prior to publication of either the review's preliminary[2] or final[3] results, an "Understanding between the United States and Mexico Regarding Subsidies and Countervailing Duties" had been reached (on April 23, 1985).[4] It provides, in part, as follows:

> 5. *INJURY TEST*
>
> For purposes of the application of countervailing measures, there shall be no presumption that incentives granted by the Government of the United Mexican States result in adverse effects to the trade or production of the United States. Such adverse effects shall be demonstrated by positive evidence, through formal investigation procedures prescribed by applicable U.S. domestic law for determining the economic impact of Mexican imports upon an industry in the United States. With respect to all United States countervailing duty investigations in progress concerning products of Mexico as of the date of entry into force of this Understanding, the United States shall ensure that no countervailing duties shall be imposed upon any product of Mexico unless it is determined that the subsidized imports are, through the effects of the subsidy, causing or threatening to cause material injury to an established domestic industry, or retard materially the establishment of a domestic industry.

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1 48 Fed.Reg. at 43,063-64.

2 *See* 50 Fed.Reg. 27,476 (July 3, 1985).

3 *See* 50 Fed.Reg. 51,732 (Dec. 19, 1985).

4 A copy is in the record as document ("R.Doc.") 39.

* * *

> 14. On the basis of this Understanding, Mexico shall be designated as a "country under the Agreement" as provided by section 701 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 effective on the date of publication of such designation in the *Federal Register*.

The date of publication of Mexico's designation as a "country under the Agreement" within the meaning of section 701, 19 U.S.C. § 1671, was April 30, 1985. *See* 50 Fed.Reg. 18,335.

The final results of the ITA's review revealed a "country-wide" bounty or grant rate of 3.50 percent *ad valorem*, but Comment 8 on the results was to the effect that the ITA should revoke its CVD order on the ground that the

> Understanding creates an international obligation on the United States to apply the same procedures in countervailing duty proceedings on Mexican products as for products from other countries. Since section 303 prohibits the Department from assessing countervailing duties on duty-free products from other countries, absent an injury test, Mexico is entitled to the same procedural treatment. 50 Fed.Reg. at 51,736.

The ITA responded that it

> has no international obligation within the meaning of section 303 of the Tariff Act to provide an injury test in this case. The Understanding specifically limits injury tests in countervailing duty proceedings to investigations in progress on April 23, 1985 and to proceedings begun on or after that date. *Id.*

It is this response which is at the core of plaintiff's complaint and present motion for judgment on the agency record pursuant to CIT Rule 56.1. The relief sought in the motion is a direction to the ITA to revoke its CVD order and to

> take the necessary steps to ensure that, in accordance with . . . revocation . . . , all remaining unliquidated entries

> of the relevant merchandise subject to the Order and the annual administrative review are liquidated without the assessment of countervailing duties.[5]

A brief submitted on behalf of intervenor-plaintiff Cementos de Chihuahua, S.A. joins with the plaintiff in seeking revocation.[6]

Jurisdiction over this case is predicated on 28 U.S.C. § 1581(c). The court has enjoined, without opposition, the liquidation of cement entries during the period of the administrative review, pending resolution of the issues raised herein.

Discussion

Of course, the overriding concern this case touches upon is continuation and enhancement of long-standing, friendly relations between the United States of America and of Mexico. To this end, representatives of the respective governments entered into the Understanding, interpretations of which are now offered by parties not responsible for its adoption. Be this as it may, the court concludes that the first analysis should be at the domestic, administrative level rather than on the international plane.

I

The actions challenged herein are those of the ITA, which is governed by the Tariff Act of 1930. That law has been amended by the Trade Agreements Act of 1979, Pub.L. No. 96-39, 93 Stat. 144 (and by the Trade and Tariff Act of 1984, Pub.L. No. 98-573, 98 Stat. 2948), which added the following section 701, 19 U.S.C. § 1671, covering imposition of countervailing duties:

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5 Plaintiff's proposed form of order, p. 2.

6 Other issues raised in plaintiff's motion, as well as in the papers of intervenor-plaintiff Cementos de Chihuahua, S.A. and the other intervenor-plaintiffs, are discussed *infra*, pages 19-24.

(a) General rule

If—

(1) the administering authority determines that—

(A) a country under the Agreement, or

(B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy . . . .

Subsection (b) defines the term "country under the Agreement" to mean a country

(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title,

(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President, or

(3) with respect to which the President determines that—

(A) there is an agreement in effect between the United States and that country which—

(i) was in force on June 19, 1979, and

(ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States,

(B) the General Agreement on Tariffs and Trade does not apply between the United States and that country, and

(C) the agreement described in subparagraph (A) does not expressly permit—

(i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by the Congress, or

(ii) nondiscriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

Here, the record shows that the merchandise involved, namely, Portland hydraulic cement and cement clinker other than white, nonstaining, was subject to importation free of duty under TSUS items 511.1420 and 511.1440. *See, e.g.*, 48 Fed. Reg. at 43,064. The record also shows that Mexico was not a "country under the Agreement" in 1983, having first attained such status in 1985 as per the following pronouncement of the United States Trade Representative:

> The Government of the United Mexican States has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.
>
> In accordance with section 701(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1671(B)), as of April 23, 1985, Mexico is a "country under the Agreement."[7]

7 50 Fed. Reg. 18,335-36 (April 30, 1985).

If a country is not one under the Agreement, subsection (d) of section 701 cross-references section 303 of the 1930 act, as amended, 19 U.S.C. § 1303, as to the levy of countervailing duties.[8] However, once a country meets the standard(s) set forth in section 701(b), then section 701(a) governs domestic, administrative imposition of any countervailing duty.[9] Under section 701(a), such imposition occurs only upon both an ITA determination of the existence of a countervailable subsidy and an International Trade Commission ("ITC") determination of material injury by reason of imports benefitting from such subsidy. This law is clear, and the court is compelled to follow its plain meaning. *See, e.g., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

Here, Mexico met the standard(s) of section 701(b) before any countervailing duties were sought to be imposed on entries for the period at issue, July 1 - December 31, 1983. The change in its status, as the country of origin, altered the status of the merchandise emanating therefrom insofar as imposition of those duties was concerned.

The defendants argue at page 18 of their memorandum that section 701 is "of no avail with respect to countervailing duty orders which predated the Understanding", *i.e.*, which predate Mexico's change in status to a country under the Agreement. By their reasoning, that change since publication of the original CVD order has no impact on the procedure for imposing duties as a result of their administrative review, yet section 701 was enacted for the purpose of distinguishing treatment of countries' products on exactly that basis. *See, e.g.*, S.Rep. 249 at 38 ("The most conspicuous change in current law . . . is the introduction of a material injury test before any countervailing duty may be imposed on products of countries which assume the obligations of the agreement relating to subsidies and counter-

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8 This provision was apparently the focus of *Cementos Guadalajara, S.A. v. United States*. *See* Slip Op. 88-48 at 31.

9 *See* S.Rep. No. 249, 96th Cong., 1st Sess. [cited hereinafter as "S.Rep. 249"], pp. 43-44 (1979) (Section 701 applies to merchandise from countries "to which the United States accords the benefits of the Agreement", while section "303 would apply to all imports other than those to which new section 701 . . . applies").

vailing measures''). Moreover, the court notes in passing that defendants' position contradicts the one taken in defense of the ITA's calculation of the specific rates to be imposed. On that matter, the agency chose not to adhere to the methodology used in its original order in view of changed facts and circumstances. *See* page 21 *infra*. Counsel assert:

> Since the facts relevant to the ITA's determination . . . changed dramatically in the administrative review as compared to the original investigation, it is beyond dispute that the ITA would not have been bound in the administrative review by its determination . . . in the original investigation, even if there had been no intervening change in the countervailing duty law. Defendants' Memorandum, pp. 23-24.

If this is true, then Mexico's official designation as a country under the Agreement certainly qualifies as such a change—one sufficient to unbind the ITA from the original parameters of its CVD order.

This does not mean, however, that the date of entry of merchandise subject to the order is of no consequence. On the contrary, that moment determines what, if any, tariff applies and also whether a countervailing duty can be assessed. As the Court of Customs & Patent Appeals put it many years ago in adopting the government's position, ''the liability for countervailing duty attached, at the time of importation, by reason of the [Secretary of Treasury's] declaration of the factum of the bounty antedating the importation''.[10] But liability for such an impost is distinct from the mechanism (and timing) of its assessment. *See, e.g., Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed.Cir. 1984) (''the duty to be assessed can only be the duty incurred in the past period covered by the review''). While the prescribed tariff is determined at the date of entry, the same cannot be said with regard

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10 *V. Mueller & Co. v. United States*, 115 F.2d 354, 361 (CCPA 1940). *Cf. Zenith Radio Corporation v. United States*, 1 CIT 180, 184, 509 F.Supp. 1282, 1286 (1981) (''it is axiomatic that a claim by the United States for the appropriate duties arises upon the entry of a shipment of merchandise into the customs territory of the United States'').

to the rate of any additional, countervailing duty. Indeed, determination of the presence of a bounty and of particularized benefit therefrom post-dates the moment of entry, and that administrative process is governed by the law existent then. To repeat, during the course of the *ex post facto* analysis of the entires herein, Mexico's status changed in such a way as to require a different administrative approach—in accordance with the applicable law of the United States.

The defendants and intervenor-defendants refer to the Trade Agreements Act's transition rules for CVD orders, § 104, 93 Stat. at 190-93, which provided for injury determinations upon request for those orders that were in effect on January 1, 1980 (or which were subsequently issued pursuant to a court action commenced prior to that date). Thus, they infer that since there are no specific provisions for an injury test for later orders like the one at issue here, no right to a test exists. However, the statute itself refutes that inference. Section 303(a), as amended by section 103(a) of the 1979 act, contemplates such orders by excluding from its coverage goods which are the product of a country under the Agreement. *See* S.Rep. 249 at 103. As set forth above, those goods are covered under section 701, which does provide for an injury test.

II

Section 303 of the Tariff Act of 1930 had been amended by the Trade Act of 1974, § 331, 88 Stat. 1978, 2049, to cover duty-free merchandise as follows:

> In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there are affirmative determinations by the Commission under subtitle IV of this chapter; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States. 19 U.S.C. § 1303(a)(2).

The ITA's interpretation of this provision, as quoted (*supra* page 4) from its December 1985 determination, is that, although the cement herein is duty-free, no international obligation required an injury test. That is, the

> Understanding specifically limits injury tests in countervailing duty proceedings to investigations in progress on April 23, 1985 . . . . 50 Fed.Reg. at 51,736.

Defendants' counsel now add that Mexico did not join the General Agreement on Tariffs and Trade[11] until August 24, 1986, or after the administrative review herein, and therefore that

> its status as a "country under the agreement" is limited by the explicit terms of the Understanding. By virtue of the Understanding, Mexico became a country under the agreement only with respect to "investigations in progress."[12]

In counsel's view, the meaning of the word "investigations" is the controlling question herein. The defendants contend that, since the executive branch of the government negotiated the Understanding, its regulations are "clearly the best evidence"[13] of what that meaning is, "notwithstanding how that term has been used by Congress or interpreted by the courts."[14] In fact, ITA regulations regarding countervailing duties define an "investigation" to refer

> to that time between the publication of a notice of initiation and the publication of the earliest of (1) a notice of termination, (2) a negative determination that has the effect of terminating the administrative proceedings; or (3) an Order.[15]

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11 Oct. 30, 1947, 61 Stat., T.I.A.S. No. 1700, 50 U.N.T.S. 184.

12 Defendants' Memorandum of Points and Authorities, p. 21.

13 *Id.* at 12.

14 *Id.* at 13.

15 19 C.F.R. § 355.6(b). *See also* 19 C.F.R. § 353.11(b) (covering antidumping proceedings).

On its face, this is the definition of a period of time and not of that which transpires then. Indeed, the plaintiff has sought to show that many of the steps taken during that period are repeated thereafter in conjunction with an administrative review pursuant to 19 U.S.C. § 1675.[16] Dictionaries do not define investigation in terms of time, but rather as the "[a]ct of investigating; process of inquiring into or tracking down; thorough inquiry; research." Webster's New International Dictionary of the English Language, p. 1306 (2d ed. 1945). *See* Funk & Wagnalls Standard Dictionary of the English Language, p. 669 (Int'l ed. 1963); Webster's Third New International Dictionary of the English Language, p. 1189 (1981). *See also* Black's Law Dictionary, p. 740 (5th ed. 1979).

As for interpretations in court or Congress, the executive version of the meaning of investigation was at issue in *Al Tech Specialty Steel Corp. v. United States*, 745 F.2d 632 (Fed. Cir. 1984), which arose out of an administrative review of an antidumping-duty order. The Trade Agreements Act had added a requirement to the Tariff Act of 1930 that the ITA "verify all information relied upon in making a final determination in an investigation." 19 U.S.C § 1677e(a). As here, the agency sought to restrict investigation to the time of its original less-than-fair-value inquiry, but the court of appeals affirmed the Court of International Trade's overruling of such a reading: the ITA's interpretation is " 'plainly inconsistent with the statute,' and contrary to 'the clear meaning' of the statute, 'as revealed by its language, purpose and history.' " 745 F.2d at 642, quoting *Southern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979)). Congress confirmed the *Al Tech* outcome in the Trade and Tariff Act of 1984, § 618, 98 Stat. at 3037-38, albeit not by defining investigation any further.

Notwithstanding the outcome in *Al Tech*, there is discussion to the effect that the statute is "ambiguous in its use of the pertinent terms" and there is "some uncertainty arising from the

16 *See, e.g.*, P.B. Feller, 1 U.S. Customs and International Trade Guide § 17.03 at pp. 17-15 to 17-16 (1987) ("The annual review . . . replicates in substance the initial subsidies investigation"). ***See generally*** E.T. Rossides, U.S. Import Trade Regulation, pp. 254-79 (1986).

statute over the meanings of the terms 'investigation', 'proceeding', and 'final determination.' " 745 F.2d at 636. When this is true, the Supreme Court has set forth "a general principle of construction with respect to treaties", to wit,

> that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their constructions words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

De Geofroy v. Riggs, 133 U.S. 258, 271-72 (1890). *See* Vienna Convention on the Law of Treaties, art. 31(1)[17]; Restatement (Second) of Foreign Relations Law of the United States, § 147(1)(a) (1965).

Article 32 of the Vienna Convention provides for supplementary means of interpretation when analysis according to Article 31 "leaves the meaning ambiguous or obscure". Perhaps both sides have had this provision in mind as they have sought to embellish the record with after-the-fact presentations regarding governmental intentions in entering into the Understanding. For example, R.Doc. 72 is a memorandum apparently drafted some six months past the date of the Understanding, April 23, 1985, by the Director of the ITA's Office of Policy, setting forth *his* interpretation thereof upon representations that he drafted the contested injury-test article (5) and that the principal U.S. negotiator "agrees with [this] interpretation". *See also* R.Doc. 87. On the other hand, R.Doc. 86 and Exhibit A to plaintiff's reply brief are letters sent in 1986 by the Mexican Minister for Trade & Fiscal Affairs, presenting his country's point of view, albeit well after the moment of publication of the ITA's determination now under review. Finally, during the

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17 *Opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340, *reprinted in* 63 Am.J. Int'l L. 875, 885 (1969).

course of this litigation, bills in Congress have been brought to the court's attention which allegedly reflect domestic executive and legislative recognition and concern for the issues herein.[18]

While these presentments are illuminating, the court has concluded in Point I above that section 701 of the Trade Agreements Act governs this case, challenging, as it does, agency action under the facts and circumstances existent in 1985. Moreover, if 19 U.S.C. § 1303(a)(2) were the controlling statute, this court is not persuaded that its reference to "the international obligations of the United States" means, as the defendants and intervenor-defendants infer, only GATT membership. While legislative history is not clear on this point[19], it is evident that the term "agreement" means the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement of Tariffs and Trade (relating to Subsidies and Countervailing Measures) and that section 303 does not apply to products from Agreement countries.[20] Since the cement from Mexico qualifies as such a product by pronouncement of the U.S. Trade Representative [*see* page 7 *supra*], sec-

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18 *See* H.R. 3, 100th Cong., 1st Sess. § 168 (1987) and Subcomm. on Trade of H.R. Comm. on Ways & Means, 100th Cong., 1st Sess., Report of Amendments to H.R. 3, pp. 60-61 (Comm. Print 1987); S. 539, 100th Cong., 1st Sess. § 5008(d) (1987) and 133 Cong.Rec. S2158 (daily ed. Feb. 19, 1987).

The version of H.R. 3 called to the court's attention would have amended section 303 by providing the ITC with authority to conduct an injury test where the requirement for one arises after a countervailing duty order has been issued. If the ITC determined the existence of injury, the order would remain in effect and countervailing duties would continue to be collected; if not, it would be revoked.

19 *Compare, e.g.*, S.Rep. No. 1298, 93rd Cong., 2d Sess. 185 (1974) *and* S.Rep. 249 at 39 and 103 *with* S.Rep 249 at 43 and 45.

20 *See* S.Rep. 249 at 37 and 103. The legislative history to the 1979 amendments to section 303 states that

> [d]uty-free articles from certain countries will be subject to countervailing duties after an injury determination, but only if international obligations of the United States, *other than the Agreement on Subsidies and Countervailing Measures*, require that determination with respect to products of those countries.

Id. at 103 (emphasis added).

tion 303 does not control, whether or not "international obligations" signify only GATT.

III

As stated at pages 4-5 above, the relief the plaintiff and intervenor-plaintiff Cementos de Chihuahua, S.A. seek is revocation of the CVD order, which the ITA opposes based upon the view that section 303 does control and its interpretation of the Understanding. Although not explicitly addressed in either the agency's final determination now under review or in the papers submitted by the defendants, a request for revocation had been made by the respondent (now plaintiff) on August 14, 1985[21] under 19 C.F.R. § 355.42, which provides, in part:

> Revocation of Countervailing Duty Order and termination of suspended investigation.
>
> (a) *In general.* Whenever the Secretary determines that a subsidy within the meaning of [19 U.S.C. § 1677(5)] is no longer being bestowed upon the manufacture, production or exportation of merchandise which is the subject of a Countervailing Duty Order and is satisfied that there is no likelihood of resumption of the subsidy, he may act to revoke or terminate, in whole or in part, such order or suspended investigation. Ordinarily, consideration of such revocation or termination will be made only subsequent to a review as described in § 355.41.
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> (b) *Application to revoke or terminate.* An application for the revocation of any Order . . . , premised upon the lack of a legal basis for the imposition of countervailing duties, may be submitted in writing by an interested party to the Secretary together with detailed information demonstrating that the imported merchandise no longer benefits from a net subsidy. . . .[22]

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21 *See* R.Doc. 60.

22 This regulation is based upon 19 U.S.C. § 1675(c).

In conjunction with its request for revocation, the respondent sought a review pursuant to 19 U.S.C. § 1675(b) based upon the "changed circumstances" that

> have occurred in this matter in the form of Mexico's new status as a "country under the Agreement" and the U.S.'s new obligation to apply an injury test in CVD cases involving Mexican imports. R.Doc. 60 at 10.

A finding of changed circumstances within the meaning of section 1675(b) engenders a review pursuant to subsection (a) of 19 U.S.C. § 1675 prior to consideration of revocation of an order. *See Gilmore Steel Corporation v. United States*, 11 CIT ____, ____, 672 F.Supp. 1459, 1463 (1987). To enable the ITA to reconsider the status of its CVD order in the light of this opinion, the court considers remand of the final results of its administrative review necessary, having concluded that section 701 is to be followed in this case and that the agency erred in relying on section 303. The court notes in this regard the determination in *Certain Fasteners from India*, 47 Fed.Reg. 44,129 (Oct. 6, 1982), cited by the plaintiff, which followed an ITA conclusion that circumstances had changed sufficiently to warrant conducting an administrative review. *See* 47 Fed.Reg. 29,695 (July 8, 1982). In that matter, the merchandise subject to the original CVD order had since acquired duty-free status. The October 1982 determination states, in part:

> . . . By statute, the Department is authorized to impose countervailing duties on duty-free products from GATT member countries only if the [ITC] has found that imports of the merchandise materially injure . . . a United States industry. There has been no such determination with respect to duty-free fasteners . . . covered by this order. As a result, the Department is revoking the [CVD] order . . . . 47 Fed.Reg. at 44,129.

IV

While the court need not dispose of the remaining issues raised by the motions herein, it may be instructive to state in view of the foregoing decision to remand that the plaintiff and intervenor-plaintiffs have not borne their burdens of persuasion that they are entitled to the relief requested on those issues in the face of the broad administrative discretion of the ITA.

As to the first issue, the plaintiff urges the court to find that the ITA erred in assessing "country-wide" rather than separate CVD rates for each importer of Mexican cement. Intervenor-plaintiffs Cementos Guadalajara, S.A. de C.V., Cementos Mexicanos, S.A. de C.V., Cementos Portland Nacional, S.A. de C.V. and Cementos Veracruz, S.A. de C.V. have moved to remand the case on this ground, while intervenor-plaintiff Cementos de Chihuahua, S.A. supports the ITA's approach except for its failure to include in the country-wide rate those companies with *de minimis* countervailable benefits.

The statutory provision governing the issue was amended by the Trade and Tariff Act of 1984, § 607, 98 Stat. at 3029 (codified at 19 U.S.C. § 1671e(a)(2)). By that amendment, as explained in *Ceramica Regiomontana, S.A. v. United States*, 10 CIT ____, 636 F.Supp. 961, 968 (1986), *aff'd*, 810 F.2d 1137 (Fed.Cir. 1987),

> Congress has endorsed the practice of publishing a country-wide countervailing duty rate by enacting a legislative presumption in favor of a country-wide rate. . . . The legislative history of the Act indicates that:
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> > This provision is intended to lessen the administrative burden on the administrative authority stemming from implementing company-specific rates. The amendment continues to permit individual company rates for significant differences in benefits. [citations omitted]

Company-specific rates *may* apply according to section 1671e(a)(2) if

> (A) the administering authority determines there is a significant differential between companies receiving subsidy benefits, or

(B) a stated-owned enterprise is involved. . . .

Thus, contrary to the import of its seemingly still-existing regulations, the ITA is not required to provide for differing rates.[23]

In explaining its assessment of duties based upon an overall rate of 3.5 percent *ad valorem* on those firms found to be receiving other than *de minimis* benefits, the agency stated that

> the record of this review shows that the number of companies has risen from five to eight. . . . Further, the spread, either measured as the exporters wish (from lowest to highest) or as we believe correct (as a variance from the country-wide average . . .) is much smaller than before. The spread from the country-wide average is in fact so small that it is not significant. 50 Fed.Reg. at 51,734.

Defendant's Memorandum states further (at page 23 and at page 25):

> . . . In the administrative review, the spread between the lowest and highest individual rates was less than half as great as the spread that occurred in the original investigation. . . .
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> . . . In this case, the Commerce Department exercised its discretion by determining that the differences in the amounts of the subsidies received by the individual Mexican cement companies were not sufficiently significant to overcome the newly-enacted statutory presumption in favor of country-wide rates.

Congress indicated through its 1984 amendment that the use of country-wide rates is to be the rule rather than the exception. The ITA's discretion in this regard is not controlled by the degree of administrative burden in calculating company-specific rates, as asserted by some of the parties.[24] Rather, it is

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23 *Compare* 19 U.S.C. § 1671e(a)(2) *with* 19 C.F.R. § 355.33(f). *See also* 50 Fed.Reg. 24,207, 24,226 (June 10, 1985) (Proposed rule and request for comments (§ 355.22(d) Calculation of Individual Rates)).

24 *See, e.g.*, Plaintiffs' Memorandum, pp. 34-37. *See generally* Memorandum of Points and Authorities of intervenor-plaintiffs Guadalajara *et al.*

affected when "there is a significant differential between companies". 19 U.S.C. § 1671e(a)(2). The record indicates that the ITA considered the differential[25] and found it not significant. *See* Fed.Reg. at 51,734.

In view of both the change in the law and in the facts since publication of the original CVD order, this court cannot conclude that that finding is unsupported by substantial evidence on the record or otherwise not in accordance with law within the meaning of 19 U.S.C. § 1561a(b)(1)(B).

Reliance on *Phillips Brothers, Inc. v. United States*, 10 CIT ____, 630 F.Supp. 1317 (1986), to support company-specific rates for this administrative review does not aid the plaintiff. That decision held, among other things, that the ITA must indicate on the record its justification for changing to average assessment of countervailing duties during a review when company-specific rates are used in its original order. Here, the defendant has provided the necessary justification for its change to country-wide rates in the final results. *See* 50 Fed.Reg. at 51,733-34.

The position of the plaintiff and intervenor-plaintiff Cementos de Chihuahua, S.A. that, assuming correct use of a country-wide rate, the ITA nevertheless erred by not including in its calculation the *de minimis* rates of other cement firms is of some moment, but, without statutory or regulatory direction of the agency in this regard, the court cannot conclude that the average assessment figure is incorrect as calculated. "[T]he *de minimis* rule deals with the unique question of when subsidization ceased". *Id.* at 51,734. Those firms with subsidization rates determined to be below 0.5 percent are deemed by the ITA as receiving no bounties or grants and are treated "in the same manner as . . . firms receiving no benefits whatsoever". *Ipsco,*

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25 *See* confidential document 6. The plaintiff challenges the appropriateness of determining the spread as a variance from the country-wide average, the preferred measurement of the defendant. *See* Plaintiff's Memorandum, p. 39.

The court stated in *Fabricas el Carmen, S.A. de C.V. v. United States*, 11 CIT ____, ____, 672 F.Supp. 1465, 1480 (1987), that "the difference is to be evaluated by comparing levels of benefits among companies, rather than by comparing a country-wide rate and the rate of subsidization of a particular company".

Inc. v. United States, 12 CIT ____, Slip Op. 88-54 at 10 (May 4, 1988). In calculating the average assessment for those receiving benefits, the agency included the rates of all such recipients. The court considers the "affirmative" rate adequately representative of the industry, and the ITA's failure to include rates not considered countervailable in the calculation of those countervailable is not erroneous. *Cf. Fabricas el Carmen, S.A. de C.V. v. United States*, 11 CIT at ____, 672 F.Supp. at 1479.

* * *

As to the valuation of short-term loans from the Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX"), the plaintiff challenges the ITA's (1) allocating entire benefit to the period under review rather than over the loan term and (2) using nominal, rather than effective, preferential rates and commercial benchmarks in calculating the benefit received. *See* Plaintiff's Memorandum, pp. 42-44.

Apparently, it is ITA policy to allocate all of the benefit of short-term-loan interest rates to the time when the interest is paid, *i.e.*, in this case, during the period under review. While plaintiff's preferred method of calculation—reflecting the financing actually received between July 1 and December 31, 1983—may be a reasonable alternative, the ITA's method is not thereby erroneous. *See. e.g.*, *Zenith Radio Corporation v. United States*, 437 U.S. 443, 450 (1978).

The same conclusion attaches to the ITA's use of nominal rates in its calculation of FOMEX benefits. Although, as the staff itself has stated, comparison of effective rates is preferred[26], in this case the ITA apparently did not possess reliable information concerning repayment dates, compensation balance requirements, collateral requirements, and fees and commissions. *See* 50 Fed.Reg. at 51,735. Rather, it used "the weighted average FOMEX pre-export and export rates" and compared them to the nominal commercial rates in Mexico, which were based upon the following:

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26 *See, e.g.*, R.Doc. 38 (Feb. 19, 1985 Memorandum from international trade analyst/IA to file re: interest rate discussion).

> . . . For peso-denominated loans we used as a benchmark the average of the nominal interest rates published monthly by Banco de Mexico in the *Indicadores Economicos*. For dollar-denominated loans, we used information obtained from the U.S. Federal Reserve Board. 50 Fed.Reg. at 27,477.

Contrary to plaintiff's contention, neither approach is unreasonable. *See Alhambra Foundry v. United States*, 9 CIT 632, 635, 626 F.Supp. 402, 407 (1985). *See also Fabricas el Carmen, S.A. de C.V. v. United States*, 11 CIT at ____, 672 F.Supp. at 1473-74.

Conclusion

In view of the foregoing, the motions for judgment on the agency record must be granted in part. Now, therefore, in conformity with the above opinion, it is

ORDERED that this matter be, and it hereby is, remanded to the International Trade Administration, U.S. Department of Commerce for reconsideration of the final determination of its first administrative review of the order *sub nom. Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker from Mexico*, 48 Fed. Reg. 43,063 (Sept. 21, 1983), in the light of the court's opinion that no countervailing duties can be imposed upon the entries from Mexico of Portland hydraulic cement and cement clinker other than white, nonstaining for the period July 1 through December 31, 1983 and at issue in this case unless it is determined that those entries, by reason of subsidy, are causing or threatening to cause material injury to an industry in the United States or that they retard materially the establishment of an industry in the United States; and it is further

ORDERED that the defendants and their successors in office, officers, employees, agents, servants, sureties and assigns be, and they hereby are, enjoined from imposing countervailing duties upon the entries from Mexico of Portland hydraulic

cement and cement clinker other than white, nonstaining for the period July 1 through December 31, 1983 and at issue in this case unless it is determined that those entries, by reason of subsidy, are causing or threatening to cause material injury to an industry in the United States or that those entries retard materially the establishment of an industry in the United States; and it is further

ORDERED that the motions of the plaintiff and the intervenor-plaintiffs for judgment upon the agency record be, and they hereby are, denied in all respects other than as set forth hereinabove.

Decided: New York, New York
May 12, 1988

By: /s/ THOMAS J. AQUILINO, JR.
Judge

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 88-48

Court No. 86-12-01525

Decided: April 27, 1988

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A. AND CEMENTOS VERACRUZ, S.A.,

Plaintiffs,

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff-Intervenor,

—v.—

UNITED STATES,

Defendant.

Before:

CARMAN, *Judge*

[Plaintiffs' motion for summary judgment denied. Judgment entered for defendant.]

Ross & Hardies, (***Joseph S. Kaplan*** on the motion); and ***O'Connor & Hannan***, (***David P. Darnell*** of counsel on the motion) for the plaintiffs.

Rogers & Wells, (***Eugene T. Rossides*** and ***Robert E. Ruggeri*** on the motion) for the plaintiff-intervenor.

Richard K. Willard, Assistant Attorney General; ***David M. Cohen***, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (***Velta A. Melnbrencis***, Assis-

tant Director, on the motion); and *Douglas A. Riggs*, General Counsel, *M. Jean Anderson*, Chief Counsel for International Trade Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Craig L. Jackson*, of counsel on the motion) for the defendant.

Stewart and Stewart, (*Eugene L. Stewart, Terence P. Stewart, D. Scott Nance*, and *William A. Fennell* on the amici brief); Cabot Corporation, (*William L. May, Jr.*, of counsel on the brief); and PPG Industries, Inc. (*Glenn Miller* of counsel on the brief) supporting defendant as amici curiae.

MEMORANDUM OPINION AND ORDER

CARMAN, JUDGE: Plaintiffs Cementos Guadalajara, S.A., Cementos Portland Nacional, S.A., and Cementos Veracruz (plaintiffs) commence this action pursuant to section 516A of the Tariff Act of 1930 (the Act) as amended 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (1986). The plaintiffs contest the Department of Commerce, International Trade Administration's (ITA) administrative review of its countervailing duty investigation pursuant to section 751 of the Act, as amended, 19 U.S.C. § 1675 (1986), (751 review), of cement and cement clinker from Mexico. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44500 (1986). The review under appeal covered entries made from January 1, 1984 through December 31, 1984 and was the second administrative 751 review of the countervailing duty order.[1]

Plaintiffs brought the action to challenge the authority of the ITA to conduct a 751 review of the countervailing duty order (CVD order) on portland hydraulic cement and cement clinker (PHC) and to issue the results thereof. Plaintiffs' action also contests the authority of the ITA to conduct future 751 reviews

1 Plaintiff-intervenor Cementos Anahuac del Golfo has filed a separate action with this Court, *Cementos Anahuac del Golfo, S.A. v. United States*, Court No. 86-01-00082, challenging the first 751 review of the original order.

based upon the order and to continue to direct the U.S. Customs Service (Customs) to collect estimated duty deposits on future entries. Plaintiffs' challenges rest on the issue whether or not the accession of Mexico to the GATT agreement should have effect on entries of the subject merchandise imported from Mexico into the U.S. at a date prior to Mexico's accession. Plaintiffs believe there is an effect, and its result should end in applying an injury determination requirement retroactively to goods entered before the accession date. Cementos Anahuac del Golfo, S.A. (plaintiff-intervenor), supports these assertions.

Plaintiffs now move for summary judgment, pursuant to Rule 56 of the rules of this Court, requesting the Court to: (1) direct the ITA to revoke the order; (2) direct the ITA to order Customs to refund all estimated duty deposits paid upon entries of the subject merchandise; and (3) direct Customs to stop collecting the estimated countervailing duty deposits on the entries of PHC.

Defendant Government urges the Court to deny plaintiffs' motion, enter judgment in favor of the defendant, and sustain the final results of the second 751 review of the CVD order on cement and cement clinker from Mexico. Amici curiae support defendant's position. Upon review of the material facts as to which there is no genuine issue, the Court denies plaintiffs' motion and enters judgment for defendant.

FACTS

The following facts appear not to be in dispute. On March 8, 1983, the United States Department of Commerce (Commerce) received a petition filed on behalf of the United States producers of PHC. The petition alleged manufacturers, producers, or exporters of PHC in Mexico received, directly or indirectly, bounties or grants within the meaning of section 303 of the Act, as amended, 19 U.S.C. § 1303. On the basis of the petition, the ITA initiated a countervailing duty investigation, on March 28, 1983, to determine if Mexican PHC manufacturers, producers, or exporters received benefits that constituted bounties or grants. *Initiation of Countervailing Duty Investigation; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed.Reg. 14,019 (1983).

At the time of the investigation Mexico was not a "country under the Agreement" within the meaning of section 701(b) of the Act, as amended, 19 U.S.C. § 1671 (1982), and therefore the ITA applied section 303 of the Act, as amended, 19 U.S.C. § 1303. Section 1303(a)(2) provides for the imposition of duties on nondutiable goods from a country which has no international obligation with the United States requiring an injury determination, by the U.S. International Trade Commission (ITC), for the merchandise. Therefore, under § 1303, the domestic industry was not required to allege, and the ITC was not required to determine, whether or not the importation of the Mexican merchandise caused or threatened to cause material injury to a United States industry.

The ITA determined the investigation was "extraordinarily complicated" and published, on May 19, 1983, its statement, pursuant to section 703(c)(1)(B)(i), of the Act, as amended, 19 U.S.C. § 1671b(c)(1)(B)(i) (1982), declaring the case extraordinarily complicated and requiring additional time necessary to make a preliminary determination. *Portland Hydraulic Cement and Cement Clinker From Mexico; Postponement of Preliminary Countervailing Duty Determination*, 48 Fed.Reg. 22606 (1983).

On July 1, 1983, the ITA completed and issued its preliminary determination that benefits constituting bounties or grants were being provided to Mexican cement businesses. *Preliminary Affirmative Countervailing Duty Determination; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 31,437 (1983). The scope of the investigation covered PHC merchandise which was currently imported under items 511.1420 and 511.1440 of the *Tariff Schedules of the United States Annotated* (TSUSA). The ITA preliminarily determined the estimated net subsidy provided by Mexico to the Mexican cement producers to be 5.69 percent *ad valorem*. *Id.* The ITA then directed Customs to "suspend liquidation of all entries of the products subject to this determination which are entered, or withdrawn from warehouse, for consumption, or to require a cash deposit or bond on these products in the amount equal to the estimated net subsidy." *Id.* at 31,437.

The only known producers and exporters of the subject merchandise in Mexico, exported to the United States, were the following businesses: Cementos Guadalajara, S.A., (plaintiff), Cementos Anahuac del Golfo, S.A., (plaintiff-intervenor), Cementos de Chihuahua, S.A., Cementos Mexicanos, S.A., and Cooperativa Cementos Hidalgo, S.C.L. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 43,063 (1983).

On September 21, 1983, the ITA published its final results of the investigation on the cement merchandise from Mexico. *Id.* Based upon its investigation, the ITA determined certain benefits constituting bounties or grants, pursuant to 19 U.S.C. § 1303, were being provided to the Mexican producers and exporters of the subject merchandise. The period of time used by the ITA, for measurement of the bounties or grants under investigation, was January 1 to December 31, 1982. *Id.* at 43,064. The ITA continued to hold, in effect, the suspension of the liquidation ordered in the preliminary determination until further notice. *Id.* at 43,070. The net bounties or grants for duty deposit purposes was established for each firm as follows: (1) Cementos Guadalajara, S.A., 5.13%; (2) Cementos Anahuac del Golfo, S.A., 1.64%; (3) Cementos de Chihuahua, S.A., 17.12%; (4) Cementos Mexicanos, S.A., 6.78%; (5) Cooperative Cementos Hidalgo, S.C.L., 0%; and (6) all other manufacturers, producers, or exporters, 6.05%. *Id.*

The ITA also continued to direct Customs to require cash deposits "in the amounts indicated above for each entry of the subject merchandise entered or withdrawn from warehouse, for consumption, on or after the date of the publication of the notice in the Federal Register, and to assess countervailing duties in accordance with sections 706(a)(1) [19 U.S.C. § 1671e(a)(1)] and 751 [19 U.S.C. § 1675] of the Act. *Id.* The ITA also stated its intention "to conduct an administrative review within 12 months of the publication of this determination . . . ." *Id.*

It should be noted the ITA, in its final affirmative determination, repeated essentially the same statement made in its prelim-

inary determination concerning Mexico's GATT status. This statement was published as follows:

> Mexico is not a "country under the Agreement" within the meaning of section 701(b) of the Act and, therefore, section 303 of the Act applies to this investigation. The merchandise being investigated is nondutiable, but there are no "international obligations" within the meaning of section 303(a)(2) of the Act which require an injury determination for nondutiable merchandise from Mexico. Therefore, under this section the domestic industry is not required to allege that, and the U.S. International Trade Commission is not required to determine whether, imports of this product cause or threaten material injury to a U.S. industry.

48 Fed. Reg. at 43,064.

On April 30, 1985, the Office of the United States Trade Representative published notice that:

> The Government of the United Mexican States has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.
>
> In accordance with section 701(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1671(b)), as of April 23, 1985, Mexico is a "country under the Agreement."

Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18,335, 18,335-36 (1985). This notice was published in response to the action of the United States entering into a "substantially equivalent agreement" with Mexico entitled "Understanding between the United States and Mexico Regarding Subsidies and Countervailing Duties" (the Understanding). This bilateral agreement, signed on April 23, 1985, required, *inter alia*, the United States to find injury or threat of injury to a United States industry before imposing

countervailing duties upon any product of Mexico. The agreement set forth, in pertinent part, as follows:

> With respect to all United States countervailing duty investigations in progress concerning products of Mexico as of the date of entry into force of this Understanding, the United States shall ensure that no countervailing duties shall be imposed upon any product of Mexico unless it is determined that the subsidized imports are, through the effects of the subsidy, causing or threatening to cause material injury to an established domestic industry, or retard materially the establishment of a domestic industry.

Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties (April 23, 1985), United States–Mexico, at paragraph 5.

On July 3, 1985, Commerce published the preliminary results of its first administrative 751 review of the outstanding CVD order on the subject cement items from Mexico. *Portland Hydraulic Cement and Cement Clinker From Mexico; Preliminary Results of Administrative Review of Countervailing Duty Order*, 50 Fed. Reg. 27,476 (1985). The review covered the time period July 1, 1983 to December 31, 1983. The preliminary determination revealed the total bounty or grant extended to four firms, including one plaintiff, Cementos Guadalajara, and plaintiff-intervenor, Cementos Anahuac del Golfo, was found to be *de minimis* and the total bounty or grant extended to the remaining firms, including plaintiffs Cementos Portland Nacional and Cementos Veracruz, was found to be 3.49 percent *ad valorem*. *Id.* at 27,479.[2]

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2 In the notice, the ITA further stated:

> The Department intends to instruct the Customs Service to assess no countervailing duties on shipments of this merchandise from the four firms with a zero or *de minimis* rate of benefit, and countervailing duties of 3.49 percent of f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouses, for consumption on or after July 8, 1983, the date of the Department's affirmative preliminary determination, and exported on or before December 31, 1983.

(footnote continued)

On November 27, 1985, the ITA published notice it had received timely requests to conduct, among other things, a second 751 review of the CVD order on PHC from Mexico covering the period of January, 1984 to December, 1984. The ITA, pursuant to 19 C.F.R. §§ 353.53a(c) and 355.10(C), declared it would initiate this review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 50 Fed.Reg. 48,825 (1985).

The ITA published its final results on December 19, 1985 of its first 751 review of the CVD order, covering entries made from July 1, 1983 through December 31, 1983. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Administrative Review of Countervailing Duty Order*, 50 Fed. Reg. 51,732 (1985). The results of the first 751 review led the ITA to determine:

> the total bounty or grant during the period of review to be zero for Cementos Guadalajara, Cementos Mexicanos, Cementos Anahuac, and 0.40 percent *ad valorem* for Cementos Hidalgo and 0.499 percent *ad valorem* for Cementos Veracruz. The Department considers any rate less than 0.50 percent to be *de minimis*. For all other firms, we determine the bounty or grant during the review period to be 3.50 percent *ad valorem*.

50 Fed.Reg. at 51,737.[3]

The Department intends to instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from the four firms and to collect 3.15 percent of the entered value on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

50 Fed. Reg. at 27479.

3 The ITA continued to inform and direct Customs as to procedure on the shipments. The published notice provided:

(footnote continued)

The ITA gave interested parties opportunity to comment on the preliminary results of the first 751 review before publishing the notice of the final results. One of the interested party firms, not a party to the present action (Cementos de Chihuahua), contended in its comments the ITA should revoke the order pursuant to the provisions of section 303 of the Act, as amended, 19 U.S.C. § 1303. Section 1303 prohibits the ITA "from assessing countervailing duties on duty-free products without an affirmative finding of injury if the United States has an international obligation to provide such an injury test." *Id.* at 51,736. Cementos de Chihuahua argued the Understanding, between the United States and Mexico granted Mexico most-favored-nation (MFN) status, and therefore it should be found Mexico and the United States had an international obligation that duty-free goods from Mexico would be afforded an injury test before countervailing duties would be assessed. Cementos de Chihuahua maintained the Understanding "requires an injury test in all then pending and subsequent investigations. It does not preclude injury tests for pre-existing countervailing duty orders." *Id.*

The ITA disagreed with these contentions. The ITA responded, in the published final results, there was:

> We will instruct the Customs Service to assess no countervailing duties on shipments of this merchandise from the five firms with zero or *de minimis* rates of subsidy, and countervailing duties of 3.50 percent of the f.o.b. invoice price on shipments from all other firms entered or withdrawn from warehouse, for consumption on or after July 8, 1983, and exported on or before December 31, 1983.
>
> The Department will instruct the Customs Service not to collect cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from the five firms with zero or *de minimis* assessment rates during the period of review or from Nacional and to collect cash deposits of estimated countervailing duties of 3.28 percent *ad valorem* for shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement and waiver shall remain in effect until publication of the final results of the next administrative review.

> no international obligation within the meaning of section 303 of the Tariff Act to provide an injury test in this case. The Understanding specifically limits injury tests in countervailing duty proceedings to investigations in progress on April 23, 1985 and to proceedings begun on or after that date.
>
> With regard to paragraph 5, we have confirmed with the U.S. negotiators that their intention was to exclude application of this Understanding to pre-existing orders. Inasmuch as the Mexican government has not commented on our preliminary results (in which we proposed to assess duties) nor exercised its rights under the disputes clause of the Understanding (paragraph 11), we have no reason to believe that the Mexican government has a different view.

Id. at 51,736.

On August 24, 1986, Mexico became a formal contracting party and acceded to the General Agreement on Tariffs and Trade (GATT)[4].

The ITA's preliminary results of the second 751 review of the CVD order were published on September 29, 1986. *Portland Hydraulic Cement and Cement Clinker From Mexico; Preliminary Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 34483 (1986). The review covered the period January 1, 1984 through December 31, 1984. As a result of its review, the ITA preliminarily determined *de minimis* bounty or grant rates existed for three Mexican firms, including plaintiff-intervenor, and a bounty or grant rate of 3.35 percent *ad valorem* existed for all other firms, including all other plaintiffs. The ITA stated its intention to instruct Customs on the assessment of duty cash deposits.[5]

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4 General Agreement on Tariffs and Trade (GATT), 30 October 1947, 61 Stat., T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947).

5 The notice set forth:

> The Department intends to instruct the Customs Service not to assess countervailing duties on shipments of Mexican portland hydraulic cement and cement clinker from the three firms with zero or *de*

(*footnote continued*)

On October 22, 1986, plaintiff-intervenor requested the ITA to take action to revoke the outstanding CVD order, contending the order was not in accordance with U.S. international obligations with Mexico under the GATT.

The ITA completed its second 751 review and published the results on December 10, 1986. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed.Reg. 44,500 (1986). In Comment 1 of these results, the ITA commented about its authority to revoke the original CVD order, as was requested by the petitioners. The following is the ITA's published comments on this contention:

> *Comment 1*: The five exporters contends [sic] that the Department should revoke this order. Section 303 of the Tariff Act prohibits the Department from assessing countervailing duties on duty-free products without an affirmative finding of injury if the United States has an international obligation to provide such an injury test. In the "Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties" ("the Understanding") signed on April 23, 1985, the United States granted Mexico most-favored-nation ("MFN") status. On August 24,

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minimis benefits, and to assess countervailing duties of 3.35 percent of the f.o.b. invoice price on shipments from all other firms exported on or after January 1, 1984 and on or before December 31, 1984.

The increase in the FOMEX interest rates reduces the total estimated bounty or grant to 3.20 percent *ad valorem*. Therefore, the Department intends to instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from Cementos Anahuac, S.A., Cementos Maya, S.A., and Cementos Mexicanos, S.A., and to collect 3.20 percent of the f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These deposit requirements and waiver shall remain in effect until publication of the final results of the next administrative review.

51 Fed.Reg. at 34,486.

> 1986, Mexico acceded to the General Agreement on Tariffs and Trade ("GATT"). Both the MFN status and GATT membership constitute international obligations of the United States, as defined in section 303. The Department cannot continue to impose countervailing duties on Mexican exports of duty-free products without an affirmative injury determination, which is required by both Article VI.6.(a) of the GATT and section 303 of the Tariff Act.
>
> *Department's position*: We believe that we lack the authority to revoke this countervailing duty order on the basis of the Understanding. We confirmed with the principal U.S. negotiators that the intent of Article 5 of the Understanding was to exclude from the application of the Understanding, and hence the application of "country under the Agreement" status, [sic] order existing before April 23, 1985. *See*, final results of countervailing duty administrative review on certain iron-metal construction castings from Mexico (51 FR 9698, March 20, 1986).
>
> We are currently considering whether Mexico's accession to the GATT affects our authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the International Trade Commission. Since Mexico's accession was effective on August 24, 1986, our decision will not affect entries covered by this review, which extends only through December 31, 1984.

51 Fed.Reg. at 44,500-1.

In similarity to the preliminary determination, the final published results of the second 751 review set forth that the ITA determined a zero or *de minimis* bounty or grant rate existed on goods exported from Mexico, during the January 1, 1984 through December 31, 1984 time period, for Cementos Maya, Cementos Mexicanos, and plaintiff-intervenor. The ITA also determined a 3.32 percent *ad valorem* rate existed for all other firms, including plaintiffs. The ITA directed Customs to continue to 'assess no countervailing duties on shipments of this merchandise from the three firms with zero or *de minimis* rates

and to assess countervailing duties of 3.32 percent of the f.o.b. invoice price shipments from all [the] other firms . . . ."

On December 12, 1986, plaintiffs filed this action challenging the final second 751 review results published on December 10, 1986 and raising their arguments concerning an injury determination and revocation of the original countervailing duty order.

On November 6, 1987, upon consent of all parties, the Court enjoined Customs and the ITA from directing the liquidation of the entries of PHC exported from Mexico during the year 1984, the time period covered by the final second 751 review results as published in the Federal Register on December 10, 1986, 51 Fed.Reg. 44,500.

BACKGROUND

Since much of plaintiffs' claims rest on the application of the U.S. countervailing duty law acting in concert with U.S. international trade agreements, it is instructive to consider the relevant statutes and their historical development in relation to United States trade treaties.

The countervailing duty law of the United States has its statutory roots established in the provisions of the Tariff Act of 1890, which, *inter alia*, provided for domestic sugar refiners' protection from unfair foreign competition. This protection consisted of countervailing duties imposed on refined sugar imported from countries that directly or indirectly paid bounties on refined sugar. Tariff Act of 1890, Ch. 1244, ¶ 237, 26 Stat. 567, 584 (1890).[6]

It was section 5 of the Tariff Act of 1897, though, that applied the countervailing duty law to all imported products.[7]

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6 The coverage of these provisions was expanded in 1894 to cover all imported sugar, new and refined. Tariff Act of 1894, ch. 349, ¶ 182 1/2, 28 Stat. 509, 521 (1894).

7 Section 5 provides as follows:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provi-

This provision was reenacted over the years by Congress without substantial change. *See* Tariff Act of 1909, § 6, 36 Stat. 85; Tariff Act of 1913, § IV(E), 38 Stat. 193; Tariff Act of 1922, § 303, 42 Stat. 935; Tariff Act of 1930, § 303, 46 Stat. 687; Trade Act of 1974, § 331(a), 88 Stat. 2049, 19 U.S.C. § 1303.

Running parallel to and interacting with the development of the U.S. countervailing duty law is the General Agreement on Tariffs and Trade, otherwise known as the GATT.[8] The GATT is an international treaty that was entered into, on October 30, 1947, by twenty-three governments, including the United States, involved in tariff negotiations after the close of World War II. The United States, and other countries that acceded to the GATT, apply this agreement under the Protocol of Provisional Application, 55 U.N.T.S. 308 (1947). This protocol stated that certain signing countries, including the United States, would undertake to apply provisionally (on or after January 1, 1948) the following: "(a) Parts I and III of the [GATT], and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." *Id.* Clause (b) has been commonly known as the "grandfather clause" because it allows the United States, as well as other countries, to retain, in force *inter alia*, any pre-existing countervailing duty laws and legislation that were inconsistent with GATT. This is significant to note

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sions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897).

8 General Agreement on Tariffs and Trade, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 182.

especially for reference in the discussion below of the Trade Act of 1974, and subsequent trade acts.

Part II of the GATT includes Article VI which deals with the area of antidumping and countervailing duties. Paragraph 6(a) of Article VI provides:

> 6. (a) No contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

GATT, 61 Stat. All, T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947).[9]

At the time of the establishment of the GATT in 1947, the United States countervailing duty law, under § 303 of the Tariff Act of 1930, only applied to dutiable items and did not provide for an injury determination. Therefore, under the "grandfather clause" of the GATT, the United States was under no obligation to apply paragraph 6(a) of the GATT, which was inconsistent with U.S. trade law.

In 1974, Congress passed the Trade Act of 1974, which, *inter alia*, amended § 303 of the trade laws, expanding the countervailing duty law to cover non-dutiable as well as dutiable items.[10] Section 303 originally contained the old law that

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9 As amended and restated by Part D of the Protocol Amending the Preamble and Parts II and III of GATT. 8 UST 1769 (Oct. 7, 1957).

10 The following amendments were made to § 303 of the Tariff Act of 1930:

> [For] Subsec[tion] (a), [the Trade Act of 1974] designated existing provisions as par. (1), added pars. (2) to (6), and in par. (1) as so designated, struck out "and such article or merchandise is dutiable under the provisions of this chapter," preceding "then upon the importation of any such article or merchandise" and struck out provisions directing

(footnote continued)

allowed countervailing duties to be assessed on only dutiable items. The 1974 amendment added, *inter alia*, subsection (a)(2) which provided as follows:

> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

19 U.S.C. § 303(a)(2) (1976).

The legislative history explains the reasons behind these amendments:

> 4. *Injury Test—Duty-Free Merchandise.*—The Committee agreed with the provision of the House bill extending the application of the countervailing duty law to duty-free articles. Under this provision, no additional duty could be imposed with respect to any duty-free article unless there is a determination by the International Trade Commission . . . that a domestic producer of like or directly competitive articles is being or is likely to be injured, or is prevented from being established by reason of importation of such article.
>
> The inclusion of an injury standard is appropriate in light of the general countervailing duty rule in Article VI of the GATT which requires a finding of injury before such duties may be levied on subsidized product imports. Section 303 of the 1930 Tariff Act does not provide for an

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the Secretary of the Treasury to ascertain, determine, or estimate, from time to time, the net amount of bounties or grants, declare the net amount so determined or estimated, and make all regulations he deems necessary for the identification of the articles and merchandise and for the assessment and collection of the additional duties.

[For] subsec[tion] (b) to (e) [, the Trade Act] added subsecs. (b) to (e).

The Trade Act of 1974, § 331(a), 19 U.S.C. § 1303, note on amendments (1976).

> injury test. However, because the present U.S. countervailing duty law, which only applies to dutiable items, predates the GATT, it is within the permitted exceptions to the GATT under the so-called "grandfather clause". However, the extension of such law to nondutiable items is not covered by any such exception and so the nondutiable items should be subject to an injury test.

S. Rep. No. 1298, 93 Cong., 2d Sess. 185, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7320.

Therefore, following the enactment of the Trade Act of 1974, injury determinations by the International Trade Commission (ITC) were required as condition precedent to imposing countervailing duties on subsidized nondutiable goods only if required by international obligations (*i.e.*, the GATT). An injury test was still not required for dutiable goods.

In 1979, Congress enacted the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144, which added a new title to the Tariff Act of 1930, Title VII: Countervailing and Antidumping Duties, 19 U.S.C. §§ 1671 through 1677g. The Trade Agreements Act was the implementing legislation for the Subsidies/Countervailing Measures Agreement (Subsidies Code), signed by GATT members, stemming from the Tokyo Round of trade negotiations of the GATT.[11] Section 101 of the Trade Agreements Act added § 701 to the Tariff Act of 1930, 19 U.S.C. § 1671, which replaced the countervailing duty law under 19 U.S.C. § 1303, as applied to exports from a "country under the Agreement. The term "under the Agreement" refers to the obligations found in the Subsidies Code of the GATT. Section 1671 provides as follows:

> § 1671. Countervailing duties imposed
>
> (a) General Rule
>
> If—
>
> (1) the administering authority determines that—
>
> (A) a country under the Agreement, or

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11 The Tokyo Round of Multinational Trade Negotiations was conducted from 1973 through to 1979.

(B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

(b) Country under the Agreement

For purposes of this part, the term "country under the Agreement" means a country—

(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title.

(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President, or

(3) with respect to which the President determines that—

(A) there is an agreement in effect between the United States and that country which—

(i) was in force on June 19, 1979, and

(ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States,

(B) the General Agreement on Tariffs and Trade does not apply between the United States and that country, and

(C) the agreement described in subparagraph (A) does not expressly permit—

(i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by the Congress, or

(ii) non-discriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

(c) Cross reference

For provisions of law applicable in the case of merchandise which is the product of a country other than a country under the Agreement, see section 1303 of this title.

19 U.S.C. § 1671 (1982).

The legislative history explains the "new" law and its effect on the "old" countervailing duty law:

Present law.—

* * * *

Section 303 generally does not require that imports benefiting from a bounty or grant injure a domestic industry before a countervailing duty is imposed. However, if the international obligations of the United States require that duty-free articles from a particular country injure a domestic industry before a countervailing duty may be imposed, then section 303(a)(2) requires a determination whether a domestic industry is being or is likely to be injured, or is prevented from being established, by reason of the importation of the article or merchandise benefiting from the bounty or grant.

* * * *

The bill.—The bill would leave section 303(a)(1) and (2) of the Tariff Act in effect. Section 303 would apply to all imports other than those to which new section 701 of the Tariff Act of 1930 . . . applies . . . .

Under section 701 of the Tariff Act . . . , a countervailing duty would be imposed on a class or kind of merchandise imported into the United States if—

(1) a country to which the United States accords the benefits of the Agreement on Subsidies and Countervailing Measures, or

(2) a person, who is a citizen or national of such a country, or an organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of that merchandise. No countervailing duty could be imposed under section 701 unless a domestic industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the class or kind of merchandise with respect to which a subsidy is being provided.

* * * *

Reason for the provision.—Section 701 would establish the conditions for imposition of countervailing duties consistent with the agreement. A domestic industry must be materially injured by reason of subsidized imports before a countervailing duty could be imposed.

Section 701 would apply only to the extent (1) required by the agreement, as determined under section 2(b) of the bill, and (2) provided under section 701(b)(2) and (3). In all other cases, section 303 of the Tariff Act of 1930, as amended under section 103 of the bill, would continue to apply. Section 303 would continue to require injury as a condition for imposition of countervailing duties only on duty-free imports and only if the international obligations of the United States so require.

Selective application of section 701 is intended to encourage countries to assume the obligations of the

agreement, or substantially equivalent obligations, with respect to the United States. This application is consistent with the agreement and the GATT, including the Protocol of Provisional Application of the General Agreement on Tariffs and Trade.

* * * *

Present law.—Section 303 of the Tariff Act (19 U.S.C. 1303) contains few procedural provisions . . . . The ITC injury determination is required . . . only with respect to duty-free goods and only to the extent required by the international obligations of the United States. The United States is obligated to apply the injury test under section 303 only with respect to duty-free products of countries which have fully acceded to the General Agreement on Tariffs and Trade.

The bill. The amendment . . . would exclude from the coverage of section 303 of the Tariff Act articles which are the product of a country under the agreement within the meaning of section 701(b) of the Tariff Act, *i.e.*, articles to which section 701 of the Tariff Act would apply.

* * * *

Reasons for the provision.—The amendments . . . conform section 303 . . . to appropriate provisions of title VII of the Tariff Act . . . . Section 303(a)(1) and (2) of the Tariff Act will continue in effect with respect to articles not subject to section 701 of that act. Section 303 will continue to impose countervailing duties, without an injury determination, on all dutiable and certain duty-free articles with respect to which bounties or grants are being provided. The President's statement of proposed administrative action erroneously asserts that an injury determination will be required before countervailing duties can be imposed on duty-free articles from any country. Duty-free articles from certain countries will be subject to countervailing duties after an injury determination, but only if international obligations of the United States, other than the Agreement on Subsidies and Countervailing Measures,

require that determination with respect to products of those countries.

S. Rep. No. 96-249, 96th Cong., 1st Sess. 43-45 and 103, *reprinted in* U.S. Code Cong. & Admin. News 381, 429-431 (footnote omitted).

Section 1303 was amended by the Trade Agreements Act of 1979 by changing the language in (a)(2) and adding new language in (b). These changes are shown as follows:[12]

> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there are affirmative determinations by the Commission under subtitle IV of this chapter except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.
>
> (b) Regulations prescribed by administering authority; imported articles or merchandise which are not duty free

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12 The amended changes are explained as follows:

Subsec. (a)(2). Pub. L. 96-39, § 103(c), substituted "are affirmative determinations by the Commission under subtitle IV of this chapter" for "is an affirmative determination by the Commission under subsection (b)(1) of this section".

Subsec. (a)(3) to (6). Pub. L. 96-39, § 103(b)(1), struck out pars. (3) to (6) which related to imported articles or merchandise as to which the Secretary of the Treasury had not determined whether or not any bounty or grant was being paid or bestowed, the determination of the question of bounty or grant, and the Secretary's authority to promulgate necessary regulations for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of those duties.

Subsec. (b). Pub. L. 96-39, § 103(b)(2), substituted provisions relating to the imposition of countervailing duties, the regulations relating to the imposition of those duties, and exceptions in the case of imported articles or merchandise which are not free of duty for provisions relating to the determination of injury with respect to duty-free merchandise and the suspension of liquidation.

Trade Agreements Act § 103, 19 U.S.C. § 1303, note on amendments (1982).

> The duty imposed under subsection (a) of this section shall be imposed, under regulations prescribed by the administering authority (as defined in section 1677(1) of this title), in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties) except that, in the case of any imported article or merchandise which is not free of duty—
>
> (1) no determination by the United States International Trade Commission under section 1671b(a), 1671c, or 1671d(b) of this title shall be required,
>
> (2) an investigation may not be suspended under section 1671c(c) of this title,
>
> (3) no determination as to the presence of critical circumstances shall be made under section 1671b(e) or 1671d(a)(2) or (b)(4)(A) of this title, and
>
> (4) any reference to determinations by the Commission, or to the suspension of an investigation under section 1671c(c) of this title.

19 U.S.C. § 1303(a)(2) and (b) (1982).

It appears, from the language of the statute and from the legislative history, that § 701 of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979, § 101, 19 U.S.C. § 1671, became the controlling countervailing duty law for countries under the Agreement and § 303, 19 U.S.C. 1303, became applicable as a residual provision covering situations that did apply under § 701, *i.e.*, situations involving countries not under the Agreement.

The Trade Agreements Act of 1979, in part, amended the U.S. trade laws to include, *inter alia*, an injury test for dutiable goods imported from a country under the GATT or from a country the U.S. recognizes as one that has assumed obligations substantially equivalent to those found in the GATT. Dutiable goods not covered under Title VII of the 1979 Act were still subject to countervailing duties without an injury determination. It appears from the language, therefore, dutiable and nondutiable merchandise subject to bounties or grants from countries or entities not "under the Agreement" and not under certain inter-

national obligations with the United States are subject to countervailing duty imposition without an injury determination.

DISCUSSION

The gravamen of plaintiffs' argument is "that the [ITA] acted contrary to law in imposing countervailing duties on imports of PHC from Mexico in *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing duty Administrative Review*, 51 Fed.Reg. 44,501 (. . . 1986)." Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment at 2, *Cementos Guadalajara, S.A v. United States*, Court No. 86-12-01525.

Plaintiffs' first arm of their argument specifically challenges the ITA's issuance of a CVD order imposing duties on the subject nondutiable imports without an affirmative injury determination by the ITC. Plaintiffs do not dispute Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 governs the ITA's determination to impose countervailing duties on the subject merchandise, *see*, Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 10, *Cementos Guadalajara, S.A.*, Court No. 86-12-01525,[13] but contend the ITA has misinterpreted the language of § 1303(a)(2), "international obligations" and has erroneously misapplied the statute by not requiring an injury determination by the ITC for the nondutiable merchandise from Mexico. Plaintiffs urge § 1303(a)(2) "mandate an injury test in all such instances [, as here]" because the "international obligations" so require. *Id.* at 11.

Defendant challenges the Court's jurisdiction to review this first argument, as well as other subordinate arguments, because plaintiffs should have raised this challenge within thirty days after publication of the CVD order, pursuant to 19 U.S.C. § 1516a. Amici curiae supports this position.

Section 1516a(a)(2)(A) states:

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13 It appears the issue of whether 19 U.S.C. § 1303 or 19 U.S.C. § 1671 should apply in situations such as the case at bar is presently under consideration by the Court in *Cementos Anahuac del Golfo, S.A. v. United States*, Court No. 86-12-01607.

(2) Review of determinations on record

(A) In general.—Within thirty days after—

(i) the date of publication in the Federal Register of—

(I) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or

(ii) the date of mailing of a determination described in clause (vi) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A) (1982).

Defendant contends "[i]n such a civil action, [plaintiffs] may contest any factual finding or legal conclusion upon which the determination is based, and judicial review is limited to determining whether the determination, finding, or conclusion is supported by substantial evidence on the record, or otherwise not in accordance with law." Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 17. Defendant contends plaintiffs should have raised their challenge to the underlying CVD order thirty days after the publication of that determination, rather than waiting over three years and two 751 reviews later; an overly lengthy hiatus that bars plaintiffs from now raising the argument. Defendant concludes the Court has jurisdiction only concerning "the factual findings

and legal conclusions which underlie Commerce's determination of the amounts of the countervailing duties which are to be assessed upon entries of PHC from Mexico which are covered by the administrative review for the period January 1, 1984 through December 31, 1984 and which could not have been raised in a civil action instituted in October of 1983." *Id.* at 21.

The Court agrees it does not have jurisdiction to review certain arguments by plaintiffs that fall under section 516A(a)(2)(A)(1)(II), 19 U.S.C. § 1516a(a)(2)(A)(i)(II), which concern plaintiffs' charging the ITA with failure to request and require an injury determination before issuing its underlying countervailing duty order, pursuant to 19 U.S.C. § 1303(a)(2). If plaintiffs believe the underlying CVD order void because of the lack of an injury determination, they should have raised this contention within thirty days after September 21, 1985, when the ITA published its determination that an injury determination was not necessary. It is proper to challenge the ITA's determination within the statutory timeframe prescribed by Congress and within the statutory timeframe which allows the ITA to determine whether it is necessary to require filing of a petition seeking an injury determination from the ITC if it determines it is proper or upon remand from the Court.

Plaintiffs have waited until the statutory framework precludes the ITC from conducting an injury investigation. *See*, 19 U.S.C. § 1671a(b)(2). They now raise an argument complaining about the lack of such procedure upon grounds they claim have been in existence since 1974, nine years prior to the date of the CVD order. Clearly plaintiffs' own inertia in filing their action and raising these arguments within thirty days after the publication of the CVD order has precluded them from raising this contention now and from this Court having jurisdiction to review the matter. *See Royal Business Machines, Inc. v. United States*, 669 F.2d 692 (CCPA 1982).[14]

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14 The Court points out, nevertheless, where an original CVD investigation is void, for example, where fraud is involved, a petitioner should be able to raise its challenge, *ab initio*, to the original determination, as part of an action challenging the results of a 751 review.

Plaintiffs' second arm of its "§ 303 injury determination requirement" argument urges, in the alternative, that Mexico's accession to GATT entitles the PHC merchandise to an injury determination in all countervailing duty proceedings. Plaintiffs state:

> [s]ince the date of the Agreement in 1985 Mexico assumed "substantially equivalent obligations" to those specified under Article VI of the GATT, and since the date of Mexico's GATT accession in 1986, Mexico has become entitled to all the privileges of GATT membership. This, of course, includes the privilege that its products not be subject to the imposition of countervailing duties where there has been no related injury determination by ITC. Section 303(a)(2).[15]

Plaintiffs' Memorandum for Summary Judgment at 33. This, plaintiffs argue, is an alternative "reason why the final results of the annual review do not provide a legal basis for ITA to direct Customs to liquidate past entries or require the deposit of estimated countervailing duties on current entries." *Id.*

Plaintiffs additionally contend:

> [a]fter GATT accession or other qualifying action, ITA is without authority to issue any order directing the Customs to *impose* final countervailing duties and liquidate entries absent an affirmative injury requirement. The fact that the entries in question were made prior to GATT accession is not dispositive; the fact the order directing imposition or final liquidation of provisional duties collected on those entries was issued *after* GATT accession is.
>
> The term "imposed", as used in Section 303(a)(2) of the Act and defined by the legislative history, has the same meaning as the term "levy" as used in the GATT and defined in the GATT Subsidies Code. Therefore, any ITA order directing the U.S. Customs Service to assess final

15 Plaintiffs have stated earlier the issue of the applicability of the 1985 Understanding to the PHC case is not at issue in plaintiffs' appeal. Therefore, the court will not address this argument. *See* Plaintiffs' Memorandum for Summary Judgment at 10.

> countervailing duties and to liquidate entries on otherwise duty-free products from a GATT Contracting Party is, regardless of when the goods were actually entered, contrary to U.S. law, absent an affirmative injury determination.

Plaintiffs' Memorandum in Support of Summary Judgment, at 46-47.

Plaintiffs conclude the only appropriate remedy, in this situation, is revocation of the outstanding CVD order. Plaintiffs' support for this argument comes from an ITA published final countervailing duty 751 review results, *Final Results and Partial Revocation of Certain Fasteners From India*, 47 Fed. Reg. 44129 (1982), and an ITA published preliminary CVD determination, *Carbon Steel Wire Rod from Trinidad and Tobago*, 50 Fed. Reg. 19561 (1985). These cases involved situations where the ITA determined (preliminarily in the Trinidad case) to revoke CVD orders covering products from current GATT member countries, entered before and after the decision by the United States Government to change the status of those products from dutiable to nondutiable status. The CVD order was maintained in effect, however, for those fasteners imported prior to the status change in *Indian Fasteners*, but was revoked for goods entered after the status change.[16]

Defendant opposes these contentions and claims plaintiffs have challenged the final second 751 review results covering the time period of January 1, 1984 through December 31, 1984, a time period existing completely before Mexico's date of accession to the GATT. Defendant continues: "Neither Section 303(a)(2) nor the GATT requires the United States to refrain from imposing countervailing duties on merchandise which was entered at a time when no international obligations of the United States required the merchandise be granted an injury test. . . ." Defendant's Memorandum in Opposition to Summary Judgment at 53-54.

Defendant disputes the notion Congress provided for a retroactive application of the countervailing duty law to the subject

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16 The ITA has yet to issue a final revocation order in its investigation *Carbon Steel Wire From Trinidad.*

merchandise entered prior to Mexico's accession to the GATT. Defendant explains, in this instance, although estimated duties are paid upon entry and the actual duties are collected after the 751 review results assess the amount, the liability for whatever duties are collected is established at the time of entry. It is recognized, defendant continues, duties are suspended until a 751 review assesses the correct amount.

Additionally, defendant argues the two published ITA determinations plaintiffs cite for support are distinguishable in the facts from the case at bar. Defendant points out in both of the cited cases, the subject merchandise came from countries already maintaining GATT membership or maintaining status as a "country under the Agreement." Defendant also points out the merchandise was duty-free upon entry. The instant case involves goods from a nation with no existing status as a member nation of GATT or as having no pre-existing rights to a different determination with goods changing status in the middle of a 751 review.

Defendant concludes the actual assessment and liquidation of duties on the subject PHC merchandise is based upon the corresponding 751 review results covering the certain time periods at issue occurring before Mexico's GATT accession and therefore not subject to an injury determination.

Section 303, the applicable statute in this action, provides, in pertinent part

> (a) Levy of countervailing duties
>
> (1) Except in the case of . . . merchandise . . . of a country under the Agreement . . . whenever any country . . . pay[s] or bestow[s] . . . any bounty or grant upon the manufacture . . . of any . . . merchandise manufactured in such country . . . then *upon the importation* of such . . . merchandise into the United States . . . there shall be *levied and paid* . . . in addition to any duties otherwise *imposed*, a duty equal to the . . . bounty or grant . . . .
>
> (2) In the case of any imported . . . merchandise which is free of duty, duties may be *imposed* under this section

> only if there are affirmative [injury] determinations by the [ITC] under subtitle IV of this chapter; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

19 U.S.C. § 1303(a)(1)-(2) (1982) (emphasis added). Subsection (b) directs that the duties imposed under subsection (a) "be imposed, under regulations prescribed by the administering authority (as defined in section 1677(i) of this title), in accordance with subtitle IV of this chapter . . ." and discusses exceptions with respect to dutiable merchandise. § 1303(b) (1982).

Plaintiffs argue the language of § 1303(a)(2), has the clear meaning that the final liquidation and imposition of assessed duties, and not merely the collection of estimated duties, may not occur, until an affirmative injury determination has been issued. Plaintiffs maintain the ITA directing Customs to impose final duties, after Mexico's accession to the GATT, was an action in direct contravention of § 1303(a)(2).

In support of this proposition plaintiffs argue Congress, in the legislative history, made evident its intent to conform § 331(a) (1303(a)) to Article VI of the GATT Agreement setting forth "[n]o contracting party shall *levy* any" CVD order without an injury determination. Plaintiffs contend that Congress intended the word "imposed" in § 303(a)(2) to have the same legal meaning as the term "levy" in GATT Article VI;[17] *i.e.*, the final assessment and imposition of duties. Plaintiffs point out the ITA has also undertaken the same analysis and arrived at the same definition as published in *Certain Fasteners From India; Final Results of Administrative Review and Partial Revocation of Countervailing Duty Order*, 47 Fed. Reg. 44129, 44130 (1986).[18]

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17 It appears the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of GATT, GATT Subsidies Code article 4, paragraph 2, footnote 14 defines "levy" as the definitive or final legal assessment or collection of duty or tax.

18 The ITA published the following language in its determination:

Section 303(a)(2) of the Tariff Act states:

• • • •

(*Footnote continued on next page*)

Plaintiffs arguments appear, on their face, convincing, but in reality misconstrue the clear and logical reading of the statute itself. The Court recognizes:

> The starting point for interpreting a statute is the language of the statute itself, which must ordinarily be regarded as conclusive absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980) . . . ; *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) . . . ; *Gilmore Steel Corp. v. United States*, 11 CIT ____, Slip Op. 87-112 at 9 (Oct. 6, 1987). Going behind a statute's plain language to search for a possibly contrary congressional intent is a step the court must take cautiously, even under the best circumstances. *United States v. Locke*, 471 U.S. 84, 95-96 (1985).

(*Footnote continued from previous page*

> To understand what Congress intended the word "imposed" to mean, we must look to the legislative history of Section 331 of the Trade Act of 1974, Senate Report 93-1298, 93rd Cong., 2d Sess. at 185 . . . .
>
> • • • •
>
> This language makes clear that Congress intended section 331(a) to conform to the Article VI GATT injury requirement. Paragraph 6 of Article VI of the GATT states that:
>
> > No contracting party shall *levy* any . . . countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the . . . subsidization . . . is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. (emphasis added)
>
> Thus, it is apparent that, in this context, Congress intended "impose" to mean "levy." The GATT does not define "levy"; however, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII if the GATT ("Subsidies Code") defines "levy" to mean "the definitive or final legal assessment or collection of a duty or tax." Accordingly, the injury requirement extends beyond the issuance of the countervailing duty order throughout the life of an order whenever duties are assessed or collected. (We also note that, while not dispositive, the title of section 303 itself is "*Levy* of Countervailing Duties". (emphasis added)

Certain Fasteners from India; Final Results, 47 Fed. Reg. at 44130.

Serampore Industries PVT. LTD. v. United States, ____ CIT ____, 675 F. Supp. 1354, 1358 (1987) (some citations omitted).

Section 1303(a)(2) states, in the case of duty free merchandise: "duties may be imposed under this Section . . . ." This refers to all of § 1303. It must be remembered subsection (a) paragraph (2) was added as an amended portion to § 1303 in 1974, providing for an injury test on duty-free merchandise. It did not supersede the rest of § 1303 but became an integral part of the statute to be read in tandem.

In the search for how duties are "imposed under this section", Subsection (a) paragraph (1) states "*then upon the importation* of such . . . merchandise into the United States . . . there shall be levied and paid . . . ." The point of reference for the requirement of an injury determination before imposition of countervailing duties appears to correspond to the time when the goods are entered or imported into the United States, not when duties are finally assessed after a 751 review. Once the mechanics of "imposition of duties" is understood, then the phrase "duties may be imposed under this section only if there are affirmative determinations by the [ITC]" becomes clear. Here, *when* the goods were imported more specifically addresses the application of Mexico's GATT accession to the entitlement to an injury determination under § 1303(a)(2), than does the argument about whether 'impose' refers to duty deposits or 751 review assessments.

Goods entered prior to Mexico's accession to GATT are subject to the corresponding outstanding CVD order and final 751 review assessments covering the time period of their entry because upon importation these goods were subject to countervailing duties as goods from a country not under the Agreement and not privileged to an injury determination as set out in the statute. See § 1303(a)(1). Duties to be assessed are those duties incurred on goods covered by the specific 751 review time periods. *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984).

That the liability for duties is established at the time of the entry of the goods into the United States has been recognized as an axiom of countervailing duty law. This Court in *Zenith Radio Corp. v. United States*, recognized:

> [A] claim by the United States for the appropriate duties arises upon the entry of a shipment of merchandise into the customs territory of the United States . . . .
>
> It is true that the amount of the claim for duties may be uncertain until liquidation occurs. Nevertheless, the claim for duties exists and an importer obtains possession of goods which he imports subject to the claim of the United States.

Zenith Radio Corp. v. United States, 1 CIT 180, 184, 509 F. Supp. 1282, 1286 (1981); *rev'd and rem'd on other grounds*, *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983); *rev'd and rem'd on other grounds*, *Zenith Radio Corp. v. United States*, 764 F.2d 1577 (Fed. Cir. 1985); *aff'd on other grounds*, *Zenith Radio Corp. v. United States*, 823 F.2d 518 (Fed. Cir. 1987). It appears the focus of the duty law is to impose the duties on the goods *as they enter* the United States, even though the actual amount may not be set or assessed until a later time, even to the extent of after a 751 review.

This implementation of the countervailing duty law is in accord with the ITA's partial revocation determination in *Fasteners from India*, 47 Fed. Reg. 44129 (1982). In this publication of the ITA's final 751 review results, the ITA partially revoked an outstanding CVD order only as it pertained to dutiable goods, from a GATT country, that were entered on or after the date the goods attained duty-free status. The CVD order was maintained in effect on those goods entered prior to the effective date the dutiable goods were recognized as nondutiable.

The Court finds the ITA's implementation of § 1303, in the instant case, imposing countervailing duties without an injury determination on the subject merchandise entered prior to Mexico's accession to the GATT, was reasonable, supported by substantial evidence on the record, and lawful. The Court holds Congress has not provided for the application of any countervailing duties on a retrospective basis in this instance and the Court will not presume to grant such provisions in this case.

Plaintiffs conclude, in their summary judgment motion papers, revocation of the outstanding CVD order is the only appropriate remedy and therefore the estimated countervailing duties which have been deposited should be refunded and the corresponding entries liquidated free of duty. Plaintiffs have also asserted, in the alternative, that the ITA be directed to refund all duties collected on the PHC entries at the latest as of Mexico's accession to the GATT.

In accordance with the findings of the Court above, the Court denies the relief sought by plaintiffs. Since the court has found defendant's determination to impose duties on the PHC reasonable, supported by substantial evidence, and in accordance with law as to the goods entered prior to Mexico's GATT accession, it follows plaintiffs' prayer for refund and liquidation for the PHC entered prior to August 24, 1986, as well as for revocation of the underlying CVD order, should be denied.

Plaintiffs' alternative request for refund of duties collected on or after August 24, 1986 and duty-free liquidation of the merchandise subject to those duties is also denied. This denial includes any request for a partial revocation of the CVD order as it might pertain to merchandise entered on or after August 24, 1986. The ITA has addressed this contention about revocation of the CVD order, as follows:

> We believe that we lack the authority to revoke this countervailing duty order on the basis of the Understanding . . . .
>
> We are currently considering whether Mexico's accession to the GATT affects our authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the [ITC]. Since Mexico's accession was effective on August 24, 1986, our decision will not affect entries covered by this review, which extends only through December 31, 1984.

Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review, 51 Fed. Reg. 44500, 44501 (1986).

It appears the decision on the refund or liquidation issues concerning all entries imported on or after August 24, 1986 is still before the ITA. Although the ITA has stated it does not believe it has the authority to revoke or partially revoke the order, it appears the question is still under consideration by the ITA as it pertains to the Mexican merchandise entered after August 24, 1986. Customs is still being directed by the ITA to collect only *estimated* countervailing duty deposits on these goods.

More importantly, as defendant has pointed out in its opposition papers, the issue of revocation, duty-free liquidation, and refund of estimated duties on goods entered after August 24, 1986, the date of Mexico's accession, is not properly before this Court. The 751 review results covering those goods entered after August 24, 1986 have not been published and as yet remain to be challenged. The plaintiffs have only deposited estimated countervailing duties on this merchandise. No actual assessed countervailing duties have been imposed on these entries at this time.

Plaintiffs have brought their action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, challenging the final results of the 751 review covering PHC entered January 1, 1984 through December 24, 1984. The final results do not address or deal with the subject merchandise entered after December 24, 1984. Plaintiffs' revocation request, as it deals with the order covering PHC entered after December 24, 1984, is untimely. Plaintiffs, pursuant to 19 U.S.C. § 1516(a)(2)(A) may contest "any factual findings or legal conclusions upon which the determination is based." As set forth above, the issues of revocation, duty free liquidation, and refund of estimated duties may be raised as they pertain to factual findings or legal conclusions in the 751 review determination covering the PHC entered prior to December 25, 1984. Concerning the PHC entered in the later review periods, the ITA has not yet made any determination upon which plaintiffs may properly raise objections. Once the ITA has made a determination in these areas, then may plaintiffs challenge the determination and any results they find unsupported by substantial evidence or otherwise contrary to law.

CONCLUSION

Based upon the discussion and legal conclusions set forth above, the Court denies plaintiffs' motion and finds judgment in favor of defendant.

This Court's order will be entered accordingly.

By: /s/ GREGORY W. CARMAN
Gregory W. Carman, *Judge*

Dated: New York, New York
April 27, 1988

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 86-12-01525

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., AND CEMENTOS VERACRUZ, S.A.,

Plaintiffs,

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff-Intervenor,

—v.—

UNITED STATES,

Defendant.

Before:

CARMAN, *Judge*

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

ORDERED, ADJUDGED, and DECREED that plaintiffs' motion for summary judgment is denied and judgment is hereby entered for defendant; and it is further

ORDERED, ADJUDGED and DECREED that this action is hereby dismissed.

By: /s/ GREGORY W. CARMAN
Gregory W. Carman, *Judge*

Dated: New York, New York
April 27, 1988

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 88-75

Court No. 86-12-01607

Decided: June 9, 1988

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff,

—v.—

UNITED STATES,

Defendant.

Before:

CARMAN, *Judge*

[Plaintiff's motion for summary judgment denied. Judgment entered for defendant. Administrative review final results sustained.]

Rogers & Wells (*Eugene T. Rossides* and *Robert E. Ruggeri* on the motion) for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Velta A. Melnbrencis*, Assistant Director, on the motion); and *Douglas A. Riggs*, General Counsel, *M. Jean Anderson*, Chief Counsel for International Trade Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Craig L. Jackson*, of counsel on the motion) for the defendant.

Stewart and Stewart, (*Eugene L. Stewart*, *Terence P. Stewart*, *D. Scott Nance* on the amici brief); Cabot Corpora-

tion, (*William L. May, Jr.*, of counsel on the brief); and PPG Industries, Inc. (*Glenn Miller* of counsel on the brief) supporting defendant as amici curiae.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge*: Plaintiff Cementos Anahuac del Golfo, S.A., (plaintiff) commences this action pursuant to section 516A of the Tariff Act of 1930 (the Act) as amended 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (1986). The plaintiff contests the Department of Commerce, International Trade Administration's (ITA) administrative review of its countervailing duty order (CVD order) investigation pursuant to section 751 of the Act, as amended, 19 U.S.C. § 1675 (1986), (751 review), of portland hydraulic cement and cement clinker (PHC) from Mexico. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44500 (1986). The review under appeal covered entries made from January 1, 1984 through December 31, 1984 and was the second administrative 751 review of the countervailing duty order.[1]

Plaintiff brought the action to challenge the final results of the ITA's 751 review claiming it was unsupported by substantial evidence and otherwise contrary to law. Plaintiff's action also contests the decision of the ITA to not revoke the CVD order, to continue to conduct future 751 reviews based upon the CVD order, and to continue to direct the U.S. Customs Service (Customs) to collect estimated duty deposits on future entries.

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1 Plaintiff filed a separate action with this Court, *Cementos Anahuac del Golfo, S.A. v. United States*, Court No. 86-01-00082, challenging the first 751 review of the original CVD order. The Court issued its slip opinion in this action, *Cementos Anahuac del Golfo, S.A. v. United States*, Slip Op. 88-58 (May 12, 1988). In the issuance of the present opinion, this Court has followed the rationale set forth in *Cementos Guadalajara, S.A. v. United States*, Slip Op. 88-48 (April 27, 1988), *appeal docketed*, No. 88-1400 (Fed. Cir. May 4, 1988), and has declined to follow the general rationale set forth in *Cementos Anahuac*, Slip Op. 88-58.

Plaintiff now moves for summary judgment, pursuant to Rules 56.1(a), and (c) and 81(j) of the rules of this Court, asking this Court to: (1) direct the ITA to revoke the CVD order; and (2) direct the ITA to take the necessary steps to ensure, in accordance with the revocation, all remaining unliquidated entries of the relevant merchandise are liquidated without the assessment of any countervailing duties.

Defendant Government urges the Court to deny plaintiff's motion, enter judgment in favor of the defendant, and sustain the final results of the 751 review of the CVD order on PHC from Mexico. Amici curiae support defendant's position. Upon review of the material facts as to which there is no genuine issue, the Court denies plaintiff's motion, enters judgment for the defendant, and sustains the final results of the second 751 review of the CVD order on PHC from Mexico, 51 Fed. Reg. 44500, as set forth in this slip opinion.

FACTS

The following facts are not in dispute. On March 8, 1983, the United States Department of Commerce (Commerce) received a petition filed on behalf of the United States producers of PHC. The petition alleged manufacturers, producers, or exporters of PHC in Mexico received, directly or indirectly, bounties or grants within the meaning of section 303 of the Act, as amended, 19 U.S.C. § 1303. On the basis of the petition, the ITA initiated a countervailing duty investigation, on March 28, 1983, to determine if Mexican PHC manufacturers, producers, or exporters received benefits that constituted bounties or grants. *Initiation of Countervailing Duty Investigation; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 14019 (1983).

At the time of the investigation, Mexico was not a "country under the Agreement" within the meaning of section 701(b) of the Act, as amended, 19 U.S.C. § 1671 (1982), and therefore the ITA applied section 303 of the Act, as amended, 19 U.S.C. § 1303.

Section 1303(a)(2) provides for the imposition of duties on nondutiable goods from a country which has no international obligation with the United States requiring an injury determination, by the U.S. International Trade Commission (ITC), for the merchandise. Therefore, under § 1303, the domestic industry was not required to allege, and the ITC was not required to determine, whether the importation of the Mexican merchandise caused or threatened to cause material injury to a United States industry.

The ITA determined the investigation was "extraordinarily complicated" and published, on May 19, 1983 its statement, pursuant to section 703(c)(1)(B)(i) (1982), of the Act, as amended, 19 U.S.C. § 1671b(c)(1)(B)(i), declaring the case extraordinarily complicated and requiring additional time necessary to make a preliminary determination. *Portland Hydraulic Cement and Cement Clinker From Mexico; Postponement of Preliminary Countervailing Duty Determination*, 48 Fed. Reg. 22606 (1983).

On July 1, 1983 the ITA completed and issued its preliminary determination that benefits constituting bounties or grants were being provided to Mexican cement businesses. *Preliminary Affirmative Countervailing Duty Determination; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 31437 (1983). The scope of the investigation covered PHC which was being imported under items 511.1420 and 511.1440 of the *Tariff Schedules of the United States Annotated* (TSUSA). The ITA preliminarily determined the estimated net subsidy provided by Mexico to the Mexican cement producers to be 5.69 percent *ad valorem*. *Id.* The ITA then directed Customs to "suspend liquidation of all entries of the products subject to this determination which are entered, or withdrawn from warehouse, for consumption, or to require a cash deposit or bond on these products in the amount equal to the estimated net subsidy." *Id.* at 31437.

The only known producers and exporters of the subject merchandise in Mexico, exported to the United States, were the following businesses: Cementos Anahuac del Golfo, S.A., (plaintiff), Cementos Guadalajara, S.A., Cementos de Chihuahua, S.A., Cementos Mexicanos, S.A., and Cooperativa

Cementos Hidalgo, S.C.L. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 43063 (1983).

On September 21, 1983, the ITA published its final results of the investigation on the cement merchandise from Mexico. *Id.* Based upon its investigation, the ITA determined certain benefits constituting bounties or grants, pursuant to 19 U.S.C. § 1303, were being provided to the Mexican producers and exporters of the subject merchandise. The period of time used by the ITA, for measurement of the bounties or grants under investigation, was January 1 to December 31, 1982. *Id.* at 43064. The ITA continued to hold, in effect, the suspension of the liquidation ordered in the preliminary determination until further notice. *Id.* at 43070. The net bounties or grants for duty deposit purposes was established for each firm as follows: (1) Cementos Anahuac del Golfo, S.A., 1.64%; (2) Cementos Guadalajara, S.A., 5.13%; (3) Cementos de Chihuahua, S.A., 17.12%; (4) Cementos Mexicanos, S.A., 6.78%; (5) Cooperative Cementos Hidalgo, S.C.L., 0% and; (6) all other manufacturers, producers, or exporters, 6.05%. *Id.*

The ITA also continued to direct Customs to require cash deposits "in the amounts indicated above for each entry of the subject merchandise entered or withdrawn from warehouse, for consumption, on or after the date of the publication of the notice in the Federal Register, and to assess countervailing duties in accordance with sections 706(a)(1) [19 U.S.C. § 1671e(a)(1)] and 751 [19 U.S.C. § 1675] of the Act." *Id.* The ITA also stated its intention "to conduct an administrative review within 12 months of the publication of this determination . . . ." *Id.*

It should be noted the ITA, in its final affirmative determination, repeated from its preliminary determination the same following statement:

> Mexico is not a "country under the Agreement" within the meaning of section 701(b) of the Act and, therefore, section 303 of the Act applies to this investigation. The merchandise being investigated is nondutiable, but there

> are no "international obligations" within the meaning of section 303(a)(2) of the Act which require an injury determination for nondutiable merchandise from Mexico. Therefore, under this section the domestic industry is not required to allege that, and the U.S. International Trade Commission is not required to determine whether, imports of this product cause or threaten material injury to a U.S. industry.

Id. at 43064.

On April 30, 1985, the Office of the United States Trade Representative published the following:

> The Government of the United Mexican States has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.
>
> In accordance with section 701(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1671(b)), as of April 23, 1985, Mexico is a "country under the Agreement."

Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18335, 18335-36 (1985). This notice was published in response to the action of the United States entering into a "substantially equivalent agreement" with Mexico entitled "Understanding between the United States and Mexico Regarding Subsidies and Countervailing Duties" (the Understanding). This bilateral agreement, signed on April 23, 1985, required, *inter alia*, the United States to find injury, or threat of injury, to a United States industry before imposing countervailing duties upon any product of Mexico. The agreement set forth, in pertinent part, as follows:

> With respect to all United States countervailing duty investigations in progress concerning products of Mexico as of the date of entry into force of this Understanding, the United States shall ensure that no countervailing duties shall be imposed upon any product of Mexico unless it is determined that the subsidized imports are, through the

effects of the subsidy, causing or threatening to cause material injury to an established domestic industry, or retard materially the establishment of a domestic industry.

Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties, (April 23, 1985) United States-Mexico, at ¶ 5.

On July 3, 1985, the ITA published the preliminary results of its first 751 review of the outstanding CVD order on the subject PHC from Mexico. *Portland Hydraulic Cement and Cement Clinker From Mexico; Preliminary Results of Administrative Review of Countervailing Duty Order*, 50 Fed. Reg. 27476 (1985). The review period covered PHC entered from July 1, 1983 to December 31, 1983. The ITA, in the preliminary results, concluded the total bounty or grant extended to four firms, including plaintiff and Cementos Guadalajara, was *de minimis* and the total bounty or grant extended to the remaining firms was 3.49 percent *ad valorem*. *Id.* at 27479.[2]

On November 27, 1985, the ITA published notice it had received timely requests to conduct, among other things, a second 751 review of the CVD order on PHC from Mexico covering the period of January, 1984 to December, 1984. The ITA, pursuant to 19 C.F.R. §§ 353.53a(c) and 355.10(C), declared it

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2 In the notice, the ITA further stated:

> The Department intends to instruct the Customs Service to assess no countervailing duties on shipments of this merchandise from the four firms with a zero or *de minimis* rate of benefit, and countervailing duties of 3.49 percent of f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouses, for consumption on or after July 8, 1983, the date of the Department's affirmative preliminary determination, and exported on or before December 31, 1983.
>
> The Department intends to instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from the four firms and to collect 3.15 percent of the entered value on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

50 Fed. Reg. at 27479.

would initiate this review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 50 Fed. Reg. 48825 (1985).

The ITA published its final results on December 19, 1985 of its first 751 review of the CVD order, covering entries made from July 1, 1983 through December 31, 1983. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Administrative Review of Countervailing Duty Order*, 50 Fed. Reg. 51732 (1985). The results of the first 751 review led the ITA to determine:

> the total bounty or grant during the period of review to be zero for Cementos Guadalajara, Cementos Mexicanos, Cementos Anahuac, and 0.40 percent *ad valorem* for Cementos Hidalgo and 0.499 percent *ad valorem* for Cementos Veracruz. The Department considers any rate less than 0.50 percent to be *de minimis*. For all other firms, we determine the bounty or grant during the review period to be 3.50 percent *ad valorem*.

Id. at 51737.[3]

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3 The ITA continued to inform and direct Customs as to procedure on the shipments. The published notice provided:

> We will instruct the Customs Service to assess no countervailing duties on shipments of this merchandise from the five firms with zero or *de minimis* rates of subsidy, and countervailing duties of 3.50 percent of the f.o.b. invoice price on shipments from all other firms entered or withdrawn from warehouse, for consumption on or after July 8, 1983, and exported on or before December 31, 1983.
>
> The Department will instruct the Customs Service not to collect cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from the five firms with zero or *de minimis* assessment rates during the period of review or from Nacional and to collect cash deposits of estimated countervailing duties of 3.28 percent *ad valorem* for shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement and waiver shall remain in effect until publication of the final results of the next administrative review.

50 Fed. Reg. at 51737.

The ITA had given interested parties opportunity to comment on the preliminary results before publishing the notice of the final results of the first 751 review. One of the interested party firms, not a party to the present action, contended in its comments that the ITA should revoke the order pursuant to the provisions of section 303 of the Act, as amended, 19 U.S.C. § 1303. Section 1303 prohibits the ITA "from assessing countervailing duties on duty-free products without an affirmative finding of injury if the United States has an international obligation to provide such an injury test." 50 Fed. Reg. at 51736. The petitioner argued the Understanding, granting Mexico most-favored-nation (MFN) status, established Mexico and the United States had an international obligation that duty-free goods from Mexico would be afforded an injury test before countervailing duties would be assessed. An interested party to the proceedings argued the Understanding "requires an injury test in all then pending and subsequent investigations. It does not preclude injury tests for pre-existing countervailing duty orders." *Id.*

The ITA disagreed with these contentions. The ITA responded, in the published final results, there were:

> no international obligations within the meaning of section 303 of the Tariff Act to provide an injury test in this case. The Understanding specifically limits injury tests in countervailing duty proceedings to investigations in progress on April 23, 1985 and to proceedings begun on or after that date.
>
> With regard to paragraph 5, we have confirmed with the U.S. negotiators that their intention was to exclude application of this Understanding to pre-existing orders. Inasmuch as the Mexican government has not commented on our preliminary results (in which we proposed to assess duties) nor exercised its rights under the disputes clause of the Understanding (paragraph 11), we have no reason to believe that the Mexican government has a different view.

Id.

Subsequently, in January of 1986, the final results of the first 751 review were challenged by plaintiff in *Cementos Anahuac*

del Golfo, S.A. v. United States, Court No. 86-01-00082. The plaintiff in that action argued the Understanding between Mexico and the United States required the ITA to revoke the CVD order on PHC from Mexico. *See Cementos Anahuac del Golfo, S.A. v. United States*, Slip Op. 88-58 (May 12, 1988).

On August 24, 1986, Mexico became a formal contracting party of, and acceded to, the General Agreement on Tariffs and Trade (GATT).[4]

The ITA's preliminary results of the second administrative 751 review of the CVD order were published on September 29, 1986. *Portland Hydraulic Cement and Cement Clinker From Mexico; Preliminary Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 34483 (1986). The review covered the period January 1, 1984 through December 31, 1984. As a result of its review, the ITA preliminarily determined *de minimis* bounty or grant rates existed for three Mexican firms, including plaintiff, and a bounty or grant rate of 3.35 percent *ad valorem* existed for all other firms. The ITA stated its intention to instruct Customs on the assessment of duty cash deposits.[5]

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4 General Agreement on Tariffs and Trade (GATT), 30 October 1947, 61 Stat. T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947).

5 The notice set forth:

> The Department intends to instruct the Customs Service not to assess countervailing duties on shipments of Mexican portland hydraulic cement and cement clinker from the three firms with zero or *de minimis* benefits, and to assess countervailing duties of 3.35 percent of the f.o.b. invoice price on shipments from all other firms exported on or after January 1, 1984 and on or before December 31, 1984.
>
> The increase in the FOMEX interest rates reduces the total estimated bounty or grant to 3.20 percent *ad valorem*. Therefore, the Department intends to instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from Cementos Anahuac, S.A., Cementos Maya, S.A., and Cementos Mexicanos, S.A., and to collect 3.20 percent of the f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this adminis-

On October 29, 1986, during the comment period, plaintiff submitted comments to the ITA regarding the preliminary results of the second 751 review. Document No. 40 of the Administrative Record of the Second Administrative Review, *Portland Hydraulic Cement From Mexico*, Case No. C-201-013 (A.R.). Plaintiff contended the ITA had no authority to continue to impose countervailing duties on the subject merchandise because of the Understanding and Mexico's GATT accession. Plaintiff asserted these events were "changed circumstances" under 19 U.S.C. § 1675(b)(i) and were sufficient to request the ITA to revoke the outstanding CVD order.[6]

The ITA completed its second 751 review and published the results on December 10, 1986. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44500 (1986). The petitioners' comment regarding revocation of the original coun-

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trative review. These deposit requirements and waiver shall remain in effect until publication of the final results of the next administrative review.

51 Fed. Reg. at 34486.

6 Plaintiff petitioned the ITA to revoke the CVD order for the following specific reasons:

> The ITA no longer has any authority to impose CVD's without an injury determination by the ITC on imports from Mexico, a "country under the Agreement" within the meaning of § 701(b)(2) of the Tariff Act of 1930, 19 U.S.C. § 1671(b)(2);
>
> the ITA also has no authority to impose CVD's on Mexican cement, a duty-free product, without the injury test required by the United States "international obligations" within the meaning of section 303(a)(2) of the Tariff Act of 1930, 19 U.S.C. § 1303(a)(2); and
>
> "changed circumstances" within the meaning of 19 U.S.C. § 1675(b)(i) occurred during the previous annual review as a result of a bilateral trade agreement between the U.S. and Mexico. These "changed circumstances" mandate that the ITA should have revoked the Order since the agency can no longer lawfully impose CVD's upon Mexican cement without the benefit of the ITC injury investigation.

A. R. Document No. 40 at 2.

The plaintiff also raised additional similar grounds for requiring the ITA to revoke the CVD order based on the fact of Mexico's accession to the GATT on August 24, 1986. A.R. Document No. 40 at 3.

tervailing duty order and the ITA's response to this comment provided as follows:

> *Comment 1*: The five exporters contends [sic] that the Department should revoke this order. Section 303 of the Tariff Act prohibits the Department from assessing countervailing duties on duty-free products without an affirmative finding of injury if the United States has an international obligation to provide such an injury test. In the "Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties" ("the Understanding") signed on April 23, 1985, the United States granted Mexico most-favored-nation ("MFN") status. On August 24, 1986, Mexico acceded to the General Agreement on Tariffs and Trade ("GATT"). Both the MFN status and the GATT membership constitute international obligations of the United States, as defined in section 303. The Department cannot continue to impose countervailing duties on Mexican exports of duty-free products without an affirmative injury determination which is required by both Article VI.6.(a) of the GATT and section 303 of the Tariff Act.
>
> *Department's Position*: We believe that we lack the authority to revoke this countervailing duty order on the basis of the Understanding. We confirmed with the principal U.S. negotiators that the intent of Article 5 of the Understanding was to exclude from the application of the Understanding, and hence the application of "country under the Agreement" status, [sic] order existing before April 23, 1985. *See*, final results of countervailing duty administrative review on certain iron-metal construction castings from Mexico (51 FR 9698, March 20, 1986).
>
> We are currently considering whether Mexico's accession to the GATT affects our authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the International Trade Commission. Since Mexico's accession was effective on August 24, 1986, our decision will not affect entries

covered by this review, which extends only through December 31, 1984.

51 Fed. Reg. at 44500-01. The additional allegations regarding the calculation of the FOMEX loans were treated as follows:

Comment 5: Anahuac del Golfo claims that the Department miscalculated the preferential rate on FOMEX export loans. Because the interest on these loans is prepaid, the effective preferential rate is higher than the nominal rate.

Department's Position: We lack sufficient information to measure an effective dollar benchmark in 1984. The Federal Reserve did not publish data on effective interest rates until 1985. Therefore, we can only compare a nominal interest rate benchmark to a nominal preferential interest rate in 1984. However, we now believe that we have sufficient information to measure benefits using effective interest rates for dollar-denominated loans from 1985 and for peso-denominated loans from 1982.

To determine the effective interest rate benchmark for the estimated duty deposit rate for dollar loans, we used the weighted-average annual effective interest rates published in the Federal Reserve Bulletin in the second quarter of 1986, the most recent information available. These weighted-average effective interest rates are based on data, for fixed rate loans under one million dollars, received from a survey of gross loan extensions made by various banks during one week of each quarter. The effective rates include the various terms of the loans in addition to the interest rate. On FOMEX export (dollar) loans the interest is prepaid. Since we have no evidence of any charges on these loans other than interest, we calculated the effective interest rate by using the nominal rate and taking into account the cost of prepayment of interest.

For peso-denominated loans, the Banco de Mexico ("the Bank") publishes in its *Indicadores Economicos* ("I.E.") both nominal and effective interest rates. Using data received from a sample of Mexican banks, the Bank

bases the nominal I.E. rates on the Costo Porcentual Promedio ("CCP"), the average cost of funds to those banks, plus a spread that reflects a risk premium. The effective I.E. interest rates are based on data received from a sample of companies representing a cross-section of the economy.

These effective rates include finance charges, *e.g.*, commissions, fees for opening a line of credit, fees for credit renewal, prepayment of interest, compensating balances, etc., and may also include compounding of interest, since many of the loans included in the Bank's sample have short (2-3 month) terms. Both the nominal and effective I.E. interest rates are weighted averages of the rates reported to the Bank by the banks and companies in the respective samples.

To determine the effective interest rate benchmark for 1984 peso loans, we used the I.E. effective rates published each month and calculated an average annual effective rate. In 1985, the Bank stopped publishing the I.E. rates. Therefore, we calculated the average spread between the CCP rate and the I.E. effective interest rates for the period 1982 through 1984, the only period for which we have I.E. rates. Our effective interest rate benchmark [sic] for purposes of the estimated duty deposit rate was the sum of this average spread and the most recent CPP rate available. For the FOMEX pre-export loans, we found no evidence of finance charges of any kind. Since interest on these loans is paid at the end of the term, we consider the nominal preferential rate to be the same as the effective preferential interest rate.

By using effective interest rates to the extent possible and making the adjustments noted in Comments 2, 3, and 4, we now find the 1984 benefit FOMEX loans to be 1.83 percent *ad valorem* and the current benefit, for purposes of cash deposits, to be 1.65 percent *ad valorem*.

Comment 6: the [sic] Anahuac Group contends that the Department inappropriately used the Federal Reserve Board weighted-average interest rate as a benchmark in

calculating the benefit from the FOMEX export loans. Instead, the Department should use published interbank rates ("aceptaciones bancarias") because the interest rate for preferred borrowers such as Anahuac del Golfo was based in 1984 on these interbank rates.

Department's Position: We disagree. The interest rates published by the Federal Reserve are derived from average rates paid by commercial borrowers. The rates that the Anahuac Group proposes are interbank rates for dollar loans, not average commercial lending rates. Although the interbank rate may be closer to the actual borrowing experience of Anahuac del Golfo, we are interested in establishing a national average benchmark rate, not a company-specific one.

51 Fed. Reg. at 44501-02.

The ITA also responded to plaintiff's complaint about the company-specific/country-wide countervailing duty rate discrepancy, as follows:

Comment 10: The Anahuac Group reasserts its position set out in the previous review that the Department must calculate company-specific countervailing duty rates in this case. There is nothing in the record to support the view that, in this case, the Department's burden is lessened by calculating a country-wide rate, which is itself derived from a weighted-average rate using the separate company rates. The Anahuac Group also maintains that section 303 of the Tariff Act requires the Department to collect duties that match *ad valorem* benefits actually received by a producer or exporter. The Department's decision in this review is governed by its final determination in this case, in which the Department found the spread of rates to be materially different.

Cementos de Chihauhua [sic], on the other hand, maintains that a country-wide rate is appropriate and consistent with the international obligations of the United States, the countervailing duty statute, current and purposed [sic] Commerce regulations, and past practice.

> *Department's Position*: We disagree with Anahuac's views. We addressed this issue at length in the final results of our last review. We have once again found that, other than the one firm with zero benefits and the two firms with *de minimis* benefits, the rates applicable to individual firms are not "significantly different" from the weighted-average rate.

Id. at 44502.[7]

The ITA, in the final published results of the second 751, determined a zero or *de minimis* bounty or grant rate existed on the PHC entered by plaintiff, Cementos Maya, and Cementos Mexicanos from January 1, 1984 through December 31, 1984. The ITA also determined a 3.32 percent *ad valorem* rate existed for all other firms. The ITA directed Customs to continue to "assess no countervailing duties on shipments of this merchandise from the three firms with zero or *de minimis* rates and to assess countervailing duties of 3.32 percent of the f.o.b. invoice price shipments from all other firms . . . ." *Id.* at 44503.

On December 16, 1986, plaintiff filed this action challenging the final second 751 review results published on December 10, 1986.

On July 1, 1987, plaintiff filed a Rule 56.1 motion. This motion is presently before the Court.

On November 6, 1987, upon consent of all parties challenging the second 751 review, the Court enjoined Customs and the ITA from liquidating the entries of PHC exported from Mexico during the year 1984, the time period covered by the final second 751 review results as published in the Federal Register on December 10, 1986. *See* 51 Fed. Reg. 44500.

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7 Plaintiff raised this issue in its challenge of the first 751 review of the CVD order covering Mexican PHC. *Cementos Anahuac*, Slip Op. 88-58.

BACKGROUND

Since much of plaintiff's action rests on the application of the United States countervailing duty and international trade agreements, it is instructive to consider the relevant statutes and their historical development in relation to United States trade treaties.

An early codification of the countervailing duty law is embodied in the Tariff Act of 1890, which, *inter alia*, provided domestic sugar refiners protection from unfair foreign competition. This protection consisted of countervailing duties imposed on refined sugar imported from countries that directly or indirectly paid bounties on refined sugar. Tariff Act of 1890, ch. 1244, ¶ 237, 26 Stat. 567, 584 (1890).[8]

It was § 5 of the Tariff Act of 1897, though, that applied the countervailing duty law to all imported products.[9] This provision was reenacted over the years by Congress without substantial change. *See* Tariff Act of 1909, § 6, 36 Stat. 85; Tariff Act of 1913, § IV(E), 38 Stat. 193; Tariff Act of 1922, § 303, 42

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8 The coverage of these provisions was expanded in 1894 to cover all imported sugar, new and refined. Tariff Act of 1894, ch. 349, ¶ 182 1/2, 28 Stat. 509, 521 (1894).

9 Section 5 provides as follows:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Tariff Act of 1897, ch. 11, § 5. 30 Stat. 151, 205 (1897).

Stat. 935; Tariff Act of 1930, § 303, 46 Stat. 687; Trade Act of 1974, § 331(a), 88 Stat. 2049, 19 U.S.C. § 1303.

The General Agreement on Tariffs and Trade, otherwise known as the GATT,[10] has had a significant effect on the development of the United States countervailing duty law. The GATT is an international treaty that entered into force on October 30, 1947. It was the result of tariff negotiations among twenty-three governments including the United States. The United States applies this agreement pursuant to the Protocol of Provisional Application, 55 U.N.T.S. 308 (1947) (Protocol). The Protocol provides that signatories, including the United States, undertake to apply provisionally (on or after January 1, 1948) the following: "(a) Parts I and III of the [GATT], and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." *Id.* Clause (b) has been commonly known as the "grandfather clause" because it allows the United States, as well as other countries, to retain, in force *inter alia*, any pre-existing countervailing duty laws and legislation that was inconsistent with GATT.

Part II of the GATT includes Article VI which deals with the area of antidumping and countervailing duties. Paragraph 6(a) of Article VI provides:

> 6. (a) No contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

GATT, 61 Stat. All, T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947).[11]

At the time of the establishment of the GATT in 1947, the United States countervailing duty law, under § 303 of the Tariff

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10 General Agreement on Tariffs and Trade, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 182 (1947).

11 As amended and restated by Part D of the Protocol Amending the Preamble and Parts II and III of GATT. 8 UST 1769 (Oct. 7, 1957).

Act of 1930, only applied to dutiable items and did not provide for an injury determination. Therefore, under the "grandfather clause" of the GATT, the United States was under no obligation to apply paragraph 6(a) of the GATT to situations which were inconsistent with U.S. trade law.

In 1974, Congress passed the Trade Act of 1974, which, *inter alia*, amended § 303 of the trade laws, expanding the countervailing duty law to cover non-dutiable as well as dutiable items.[12] Section 303 originally contained the old law that allowed countervailing duties to be assessed on only dutiable items. The 1974 amendment added, *inter alia*, subsection (a)(2) which provided as follows:

> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

19 U.S.C. § 1303(a)(2) (1976).

The legislative history explains the reasons behind these amendments:

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12 The following amendments were made to § 303 of the Tariff Act of 1930:

> [For] Subsec[tion] (a), [the Trade Act of 1974] designated existing provisions as par. (1), added pars. (2) to (6), and in par. (1) as so designated, struck out "and such article or merchandise is dutiable under the provisions of this chapter," preceding "then upon the importation of any such article or merchandise" and struck out provisions directing the Secretary of the Treasury to ascertain, determine, or estimate, from time to time, the net amount of bounties or grants, declare the net amount so determined or estimated, and make all regulations he deems necessary for the identification of the articles and merchandise and for the assessment and collection of the additional duties.
>
> [For] subsec[tion] (b) to (e) [, the Trade Act] added subsecs. (b) to (e).

The Trade Act of 1974, § 331(a), 19 U.S.C. § 1303 note on amendments (1976).

> 4. *Injury Test—Duty Free Merchandise.*—The Committee agreed with the provision of the House bill extending the application of the countervailing duty law to duty-free articles. Under this provision, no additional duty could be imposed with respect to any duty-free article unless there is a determination by the International Trade Commission . . . that a domestic producer of like or directly competitive articles is being or is likely to be injured, or is prevented from being established by reason of importation of such article.
>
> The inclusion of an injury standard is appropriate in light of the general countervailing duty rule in Article VI of the GATT which requires a finding of injury before such duties may be levied on subsidized product imports. Section 303 of the 1930 Tariff Act does not provide for an injury test. However, because the present U.S. countervailing duty law, which only applies to dutiable items, predates the GATT, it is within the permitted exceptions to the GATT under the so-called "grandfather clause". However, the extension of such law to nondutiable items is not covered by any such exception and so the nondutiable items should be subject to an injury test.

S. Rep. No. 1298, 93 Cong., 2d Sess. 185, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7320.

Therefore, following the enactment of the Trade Act of 1974, injury determinations by the International Trade Commission (ITC) were required as a condition precedent to the imposition of countervailing duties on subsidized nondutiable goods only if required by international obligations (*i.e.*, the GATT). An injury test was still not required for dutiable goods.

In 1979, Congress enacted the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144, which added a new title to the Tariff Act of 1930, Title VII, Countervailing and Antidumping Duties, 19 U.S.C. 1671 through 1677g. The Trade Agreements Act was the implementing legislation for the Subsidies/Countervailing Measures Agreement (Subsidies Code), signed by GATT members, stemming from the Tokyo Round of trade

negotiations of the GATT.[13] Section 101 of the Trade Agreements Act added § 701 to the Tariff Act of 1930, 19 U.S.C. § 1671, which replaced the countervailing duty law under 19 U.S.C. § 1303 as applied to exports from a "country under the Agreement. The term "under the Agreement" refers to the obligations found in the Subsidies Code of the GATT agreement. Section 1671 provides as follows:

> § 1671. Countervailing duties imposed
>
> (a) General Rule
>
> If—
>
> (1) the administering authority determines that—
>
> (A) a country under the Agreement, or
>
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,
>
> is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise,
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.
>
> (b) Country under the Agreement
>
> For purposes of this part, the term "country under the Agreement" means a country—

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13 The Tokyo Round of Multinational Trade Negotiations was conducted from 1973 to 1979.

(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title.

(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President, or

(3) with respect to which the President determines that—

(A) there is an agreement in effect between the United States and that country which—

(i) was in force on June 19, 1979, and

(ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States,

(B) the General Agreement on Tariffs and Trade does not apply between the United States and that country, and

(C) the agreement described in subparagraph (A) does not expressly permit—

(i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by the Congress, or

(ii) non-discriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

(c) Cross reference

For provisions of law applicable in the case of merchandise which is the product of a country other than a country under the Agreement, see section 1303 of this title.

19 U.S.C. § 1671 (1982).

The legislative history explains the "new" law and its effect on the "old" countervailing duty law:

Present law.—

* * * *

Section 303 generally does not require that imports benefiting from a bounty or grant injure a domestic industry before a countervailing duty is imposed. However, if the international obligations of the United States require that duty-free articles from a particular country injure a domestic industry before a countervailing duty may be imposed, then section 303(a)(2) requires a determination whether a domestic industry is being or is likely to be injured or is prevented from being established, by reason of the importation of the article or merchandise benefiting from the bounty or grant.

* * * *

The bill.—The bill would leave section 303(a)(1) and (2) of the Tariff Act in effect. Section 303 would apply to all imports other than those to which new section 701 of the Tariff Act of 1930 . . . applies . . . .

Under section 701 of the Tariff Act . . . a countervailing duty would be imposed on a class or kind of merchandise imported into the United States if—

(1) a country to which the United States accords the benefits of the Agreement on Subsidies and Countervailing Measures, or

(2) a person, who is a citizen or national of such country, or an organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of that merchandise. No countervailing duty could be imposed under section 701 unless a domestic industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the class or kind of merchandise with respect to which a subsidy is being provided.

* * * *

Reason for the provision.—Section 701 would establish the conditions for imposition of countervailing duties consistent with the agreement. A domestic industry must be materially injured by reason of subsidized imports before a countervailing duty could be imposed.

Section 701 would apply only to the extent (1) required by the agreement, as determined under section 2(b) of the bill, and (2) provided under section 701(b)(2) and (3). In all other cases, section 303 of the Tariff Act of 1930, as amended under section 103 of the bill, would continue to apply. Section 303 would continue to require injury as a condition for imposition of countervailing duties only on duty-free imports and only if the international obligations of the United States so require.

Selective application of section 701 is intended to encourage countries to assume the obligations of the agreement, or substantially equivalent obligations, with respect to the United States. This application is consistent with the agreement and the GATT, including the Protocol of Provisional Application of the General Agreement on Tariffs and Trade.

* * * *

Present law.—Section 303 of the Tariff Act (19 U.S.C. 1303) contains few procedural provisions . . . . The ITC injury determination is required . . . only with respect to duty-free goods and only to the extent required by the international obligations of the United States. The United States is obligated to apply the injury test under section 303 only with respect to duty-free products of countries which have fully acceded to the General Agreement on Tariffs and Trade.

The bill. The amendment . . . would exclude from the coverage of section 303 of the Tariff Act articles which are the product of a country under the agreement within the meaning of section 701(b) of the Tariff Act, *i.e.*, articles to which section 701 of the Tariff Act would apply.

* * * *

> *Reasons for the provision.*—The amendments . . . conform section 303 . . . to appropriate provisions of title VII of the Tariff Act . . . . Section 303(a)(1) and (2) of the Tariff Act will continue in effect with respect to articles not subject to section 701 of that act. Section 303 will continue to impose countervailing duties, without an injury determination, on all dutiable and certain duty-free articles with respect to which bounties or grants are being provided. The President's statement of proposed administrative action erroneously asserts that an injury determination will be required before countervailing duties can be imposed on duty-free articles from any country. Duty-free articles from certain countries will be subject to countervailing duties after an injury determination, but only if international obligations of the United States, other than the Agreement on Subsidies and Countervailing Measures, require that determination with respect to products of those countries.

S. Rep. No. 96-249, 96th Cong., 1st Sess. 43-45 and 103, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 429-31 and 489 (footnote omitted).

Section 1303 was amended by the Trade Agreements Act of 1979 by changing the language in (a)(2) and adding new language in (b). These changes are shown as follows:

> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there are affirmative determinations by the Commission under subtitle IV of this chapter; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.
>
> (b) Regulations prescribed by administering authority; imported articles or merchandise which are not duty free
>
> The duty imposed under subsection (a) of this section shall be imposed, under regulations prescribed by the administering authority (as defined in section 1677(1) of

this title), in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties) except that, in the case of any imported article or merchandise which is not free of duty—

(1) no determination by the United States International Trade Commission under section 1671b(a), 1671c, or 1671d(b) of this title shall be required,

(2) an investigation may not be suspended under section 1671c(c) of this title,

(3) no determination as to the presence of critical circumstances shall be made under section 1671b(e) or 1671d(a)(2) or (b)(4)(A) of this title, and

(4) any reference to determinations by the Commission, or to the suspension of an investigation under section 1671c(c) of this title which are not permitted or required by this subsection shall be disregarded.

19 U.S.C. § 1303(a)(2) and (b) (1982).

It appears, from the language of the statute and from the legislative history, that § 701 of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979 § 101, 19 U.S.C. § 1671 became the controlling countervailing duty law for countries under the Agreement and § 303, 19 U.S.C. § 1303, became applicable as a residual provision covering situations that did not apply under § 701, *i.e.*, situations involving countries not under the Agreement.

The Trade Agreements Act of 1979, in part, amended the U.S. trade laws to include, *inter alia*, an injury test for dutiable goods imported from a country under the GATT or from a country the United States recognizes as one that has assumed obligations substantially equivalent to those found in the GATT. Dutiable goods not covered under Title VII of the 1979 Act were still subject to countervailing duties without an injury determination.

It appears from the language, therefore, dutiable and nondutiable merchandise subject to bounties or grants from countries or entities not "under the Agreement" and not under certain international obligations with the United States are subject to

countervailing duty imposition without an injury determination.

DISCUSSION

Plaintiff's main contention concerns the authority of the ITA to impose countervailing duties on PHC without an ITC injury finding in the second 751 review covering imports entered in 1984. Specifically, plaintiff argues the Understanding and Mexico's accession to the GATT under United States countervailing duty law require an injury determination by the ITC before the ITA may impose countervailing duties on the subject nondutiable goods. Plaintiff also contends Mexico's status under these two agreements constitutes a changed circumstance warranting revocation of the outstanding CVD order. Plaintiff urges the ITA's refusal to revoke the CVD order was contrary to law.

Plaintiff further contends the ITA's decision to use a single "country-wide" weighted-average CVD rate in the second 751 review covering 1984 imports of PHC, in contradiction to its previous use of "company-specific" rates in the original CVD final determination, was unsupported by substantial evidence and was otherwise contrary to law.

Plaintiff also argues the ITA's methodology in using a nominal rate, and not the actual effective interest rate, in comparison to a nominal benchmark rate for purposes of calculating alleged subsidies received from short-term FOMEX loans, was unreasonable.

Defendant contends the question of whether or not the ITA should have revoked the outstanding CVD order is not properly before the Court for review. Defendant contends plaintiff's action challenging the final results of the second 751 review must be restricted to challenging the factual findings and legal conclusions underlying those results pursuant to 19 U.S.C. § 1516a(2). The final results, defendant maintains, were not based upon the ITA's decision about the request for revocation because the ITA is still considering the request. Therefore, defendant concludes, the revocation question should be prop-

erly raised at a later date, if at any time, when the ITA has decided the issue.

Defendant additionally claims the ITA properly decided that the PHC entered in 1984 was subject to the imposition of countervailing duties without an injury determination. Defendant argues no international obligations or GATT entitlements for Mexico were in existence when the subject merchandise was imported into the United States in 1984. Therefore, concludes defendant, the ITA had authority to impose countervailing duties on the entries without first requiring an injury determination from the ITC.

Defendant stresses the ITA's methodologies involving country-wide rates and calculations of FOMEX loan benefits were lawful and substantiated by evidence on the record.

Initially the Court must decide if it can properly examine the question of whether the ITA should have revoked the outstanding CVD order on PHC from Mexico. Plaintiff maintains, in light of the Understanding and on account of the accession of Mexico to the GATT, the ITA had no authority to impose duties on the goods and therefore the CVD order should have been revoked.

Defendant, on the other hand, contends the revocation of the CVD order is not properly before this Court since this is a civil action, pursuant to 19 U.S.C. § 1516a, challenging the final results of an administrative review of an outstanding CVD order by the ITA. Defendant urges that the Court's jurisdiction is limited by the provisions of 28 U.S.C. § 1581(c), pursuant to which the Court can review only the amount of the countervailing duty which the ITA calculated during the review and the factual findings and legal conclusions which underlie that determination. Defendant contends that since the ITA has not yet decided the revocation question, a challenge pertaining to revocation should be made when the question has been ultimately resolved.

As provided above, the ITA responded to the petitioner's request for revocation of the CVD order in pertinent part as follows:

> *Department's position*: We believe that we lack the authority to revoke this [CVD] order on the basis of the Understanding. We confirmed . . . the intent of the Understanding was to exclude . . . order [sic] existing before April 23, 1985 . . . .
>
> We are currently considering whether Mexico's accession to the GATT affects our authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the [ITC]. Since Mexico's accession was effective on August 24, 1986, our decision will not affect countries covered by this review, which extends only through December 31, 1984.

51 Fed. Reg. at 44501 (citation omitted).

Although the defendant contends the ITA has not made a decision on the revocation question, it is clear from the language of the results that the ITA has made a decision not to revoke the order on the basis of the Understanding and has arrived at the legal conclusion that the "decision will not affect entries covered by this review, which extends only through December 31, 1984." *Id.* Furthermore, the results reveal the ITA directed the Customs Service to assess countervailing duties on certain goods covered by the review, clearly an action affecting the goods.

It is also clear plaintiff has properly brought its action under 19 U.S.C. § 1516a(2) challenging the factual findings and legal conclusions underlying the final results. The ITA has arrived at the legal conclusions that the Understanding does not affect the ITA's authority to maintain the CVD order and the Mexico GATT accession does not affect goods covered in the review. These conclusions, in response to petitioners' request for a revocation, are integral to the ITA's decision to assess countervailing duties, and as such, comprise an appealable basis for review.

Defendant's argument the revocation question is not reviewable by this Court does have merit, but only insofar as it pertains to that portion of the CVD order covering goods entered after the date of the accession of Mexico to the GATT, that is, August 24, 1986. *See Cementos Guadalajara, S.A. v. United*

States, ____ CIT ____ ____, Slip Op. 88-48 at 46-47 (April 27, 1988), *appeal docketed*, No. 88-1400 (Fed. Cir. May 4, 1988). The ITA has reserved decision as to what effect the accession will have on the ITA's authority to assess countervailing duties on entries after 1984 and, therefore, whether or not the outstanding CVD order should be revoked as to those entries. In the interim, the ITA is directing Customs to collect countervailing duties on those goods covered under the second 751 reviews; only estimated duties will be imposed by Customs on all other goods entered after this date.

The 751 review results covering those goods entered after the GATT accession have not yet been published. Once the 751 review results on these goods and the decision to revoke the order are published, then plaintiff can properly challenge the final determination concerning those goods. *See id.*; 19 U.S.C. § 1675(c); 19 C.F.R. § 355.42.

Plaintiff's main contention in this action is the ITA failed to revoke its CVD order on PHC from Mexico and continued to impose countervailing duties on the merchandise without an affirmative finding of injury by the ITC as required by statute and international obligations. Plaintiff has advanced several arguments in support of its contention. Plaintiff urges the Court to find that the ITA's final results of its second 751 review of the CVD order concerning PHC are unsupported by substantial evidence on the record or are otherwise not in accordance with law.

Plaintiff asserts that Mexico is a "country under the Agreement" pursuant to the Understanding given effect between the United States and Mexico on April 23, 1985. Because Mexico has attained this status,[14] continues plaintiff, the ITC must

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14 Plaintiff asserts 19 U.S.C. § 1671(b) identifies a "country under the Agreement" as "one which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President." Due to the declaration of the United States President by the United States Trade Representative's Office, on April 30, 1985, that Mexico was a country under the Agreement, *Determination Regarding the Application of Certain International Agreements*, 50 Fed. Reg. 18335 (1985), plaintiff concludes that it is clear that Mexico has attained the status of "a country under the Agreement."

make an affirmative injury determination before it may impose and assess countervailing duties on the Mexican PHC pursuant to § 701(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671(a). According to the plaintiff, this entitlement was bestowed on the effective date of the Understanding but was retrospectively applicable to all PHC merchandise under an "investigation in progress."

Plaintiff maintains the Understanding makes clear the United States is obligated not to impose countervailing duties without an injury determination " 'with respect to all United States countervailing duty investigations in progress as of the date of entry into force of this Understanding . . . .' " Plaintiff's Memorandum in Support of its Motion for Judgment Upon the Agency Record, *Cementos Anahuac del Golfo. S.A. v. United States*, Court No. 86-12-01607 at 19 (quoting the Understanding at ¶ 5). Plaintiff urges the phrase "investigations in progress" should be interpreted to include proceedings in annual 751 reviews as well as proceedings in pre-CVD order investigations. Because the second 751 review covering the PHC entered in 1984 had not been completed at the time the Understanding was signed, plaintiff maintains this review and the underlying CVD order should have been revoked when no affirmative injury determination was made during this "investigation" that was in progress.[15]

Defendant, while not disputing plaintiff's assertion the Understanding conveyed upon Mexico "country under Agreement" status, challenges the notion that an injury determination was necessary before the ITA could assess countervailing duties on the PHC entered in 1984. Defendant claims there were no international obligations requiring an injury determination in existance at the time the subject PHC entered into the United States. Defendant criticizes the plaintiff's interpretation of the term "investigations in progress" as conflicting with the intent of the negotiators of the Understanding and the ITA's regula-

15 Although plaintiff argues the ITA should have revoked the CVD order in the course of the *first* 751 review, plaintiff contends in a footnote that this argument is pending before the Court in a different action. *Cementos Anahuac del Golfo, S.A. v. United States*, Court No. 86-01-00082. The Court issued its decision on that action in Slip Op. 88-58, on May 12, 1988.

tions. Defendant claims "investigations in progress" refers only to inquiries made prior to the publication of a CVD order.

The Court notes the Executive Branch of the United States Government, through the United States Trade Representative's Office, published a formal declaration that, as of April 23, 1985, the effective date of the Understanding, pursuant to 19 U.S.C. § 1671(b), Mexico is a "country under the Agreement." *Determination Regarding the Application of Certain International Agreements*, 50 Fed. Reg. 18335 (1985). This declaration is embodied in paragraph 14 of the Understanding. This would necessarily result in Mexico receiving the same treatment under the United States trade laws pursuant to § 1671(b) as any other country found to be "under the Agreement." Since GATT member countries and, in general, countries "under the Agreement" are afforded the same treatment under United States trade laws pursuant to § 1671(b), it would appear that the ITA's decision it lacked authority, pursuant to the Understanding, to revoke the CVD order covering PHC entered before April 23, 1985 was in accord with the decision it made pertaining to Mexico's accession to the GATT. Both the signing of the Understanding and the accession to the GATT would seem to affect the ITA's "authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the [ITC]," 51 Fed. Reg. at 44501, in the same manner. Neither agreement had provision for retroactive effect; *i.e.*, neither affected the 1984 PHC which was entered before the effective date of either agreement.

The Court's observation above (that 1671(b) applies), though, does not provide a basis for validating plaintiff's argument concerning the requirement of an injury determination for the PHC entered in 1984. Plaintiff believes the key issue at stake is whether or not the language, "investigations in progress," embodied in the Understanding, should be interpreted to include 751 reviews. Although significant, this phrase should not be scrutinized without resort to the remainder of the language of paragraph 5. The Court therefore looks to the entire language of paragraph 5 of the Understanding.

Paragraph 5 provides "[w]ith respect to all United States *countervailing duty investigations in progress* . . . the United

States shall ensure that *no countervailing duties shall be imposed upon any product* of Mexico unless it is determined that the subsidized imports are . . . causing or threatening to cause material injury . . . ." *Understanding, supra*, at ¶ 5 (emphasis added). The central focus of the Court's interpretation of this sentence deals not with the introductory prepositional phrase, but with the independent clause concerning the imposition of countervailing duties.

The Court has recognized that United States countervailing duty law provides for the imposition of duties on merchandise as it is entered even though the actual amount of duties due may not be finally assessed until a later time, including after possible successive 751 reviews. *Cementos Guadalajara*, Slip Op. 88-48 at 43.

While paragraph 5 of the Understanding contains distinct language concerning the imposition of duties and investigations in progress, the significance of paragraph 5 is to extend to Mexico status as a "country under the Agreement"[16] and thereby afford Mexican products the right to an injury determination under United States countervailing duty law as set forth in Title VII of the Tariff Act of 1930, 19 U.S.C. §§ 1671 through 1677g. This status and the corresponding statutory entitlements, however, did not become extant for Mexico and its goods until April 23, 1985, the effective date of the Understanding. The PHC from Mexico entered prior to this date was not entitled to the applicable injury determination under United States law. Because the PHC was entered prior to Mexico's recognition as a "country under the Agreement," the imposition of duties on those goods entered prior to April 23, 1985 was not subject to an affirmative injury determination before the final assessment and liquidation stage of the proceedings. *See generally Cementos Guadalajara*, Slip Op. 88-48.

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16 Mexico attained this status by assuming "obligations with respect to the United States which are substantially equivalent to obligations under the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade." *Determination Regarding the Application of Certain International Agreements*, 50 Fed. Reg. 18335 (1985). *See* 19 U.S.C. § 1671(b)(2).

Plaintiff contends the second 751 review was an "investigation in progress" when the Understanding was signed and therefore no duties should have been assessed for PHC covered by that review without an affirmative injury determination. Plaintiff cites *Al Tech Specialty Steel Corp. v. United States*, 3 Fed. Cir. (T) 1, 745 F.2d 632 (Fed. Cir. 1984), for support of its proposition that a 751 review is an "investigation" for purposes of interpretation of paragraph 5 of the Understanding. Notwithstanding the Court's holding above, the Court will address these contentions to provide further support for the Court's decision.

As plaintiff recognizes in its reply brief, "*Al Tech* is not on all fours . . . ." in holding that the word "investigations," for purposes of the Understanding, includes a 751 review. The pertinent issue in *Al Tech* involved the definition of the *phrase* "final determination in an investigation" as applicable to verification of information by the ITA as required by 19 U.S.C. § 1677e(a). The government appellant in *Al Tech* contended the lower court:

> erred in holding that [§ 1677e(a)] requires . . . verification in section 751 periodic reviews . . . . [The Appellant] maintain[ed] that a "final determination in an investigation" occurs only in . . . "the investigative phase" of an administrative antidumping or countervailing duty 'proceeding,' not in 'the assessment phase' of a proceeding in which section 751 period reviews occur."

Al Tech, 745 F.2d at 634.

The United States Court of Appeals for the Federal Circuit, in *Al Tech*, carefully limited the definitional analysis of the word "investigation" to the application of verification under § 1677e(a). The court found the word "investigation" as used throughout the statutes lacked a plain and consistent meaning. Nevertheless, the court held, pursuant to 1677e(a), verification of information was required in both the investigative and assessment phases since the legislative history made evident to the court that "Congress intended no limitation on the verification requirement to the investigative phase of the inquiry." *Id.* at 640.

It is important to note Congress remedied the ambiguity, as noted by the *Al Tech* court, by amending § 1677e(a) in the Trade and Tariff Act of 1984. The relevant change enacted by Congress was legislation directing the agency to verify all information relied upon in: (1) a final determination in an investigation; (2) a revocation under section 1675(c): and (3) a review and determination under section 1675(a).[17] 19 U.S.C. 1677e(a) (1985). Congress made a clear distinction between an "investigation" and a "751 review."

Defendant points out the ITA conferred with the United States officials, who helped to negotiate the Understanding, prior to publication of the first 751 review results. It appears from these conferences, the meaning ascribed to the "investigations in progress" refers to that period of inquiry prior to the publication of a CVD order. *See* 50 Fed. Reg. at 51736 ("we have confirmed with U.S. negotiators that their intention was to exclude application of the Understanding to pre-existing orders").

Defendant cites an ITA memorandum from the Director of the ITA's Office of Policy, dated October 4, 1985, which provides as follows:

> You asked for my interpretation of the U.S.-Mexico Understanding Regarding Subsidies, which was signed on April 23, 1985. Specifically, you asked whether MFN

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17 The original text of § 1677e(a) prior to the 1984 amendment provided as follows:

> § 1677e. Verification of Information
>
> (a) General Rule
>
> Except with respect to information the verification of which is waived under section 1673b(b)(2) of this title, the administering authority shall verify all information relied upon in making a final determination in an investigation. In publishing such a determination, the administering authority shall report the methods and procedures used to verify such information. If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its determination, which may include the information submitted in support of the petition.

19 U.S.C. § 1677e(a) (1982).

[most favored nation] principles require that we revoke outstanding CVD orders unless an injury test is provided.

The short answer is no. Although Mexico was designated as a "country under the Agreement" by virtue of the entry into force of the Understanding, the Understanding clearly provides that the injury test will not apply to proceedings in which CVD orders were issued prior to April 23, 1985. Under Article 5 of the Understanding (at page 10) the United States agrees to apply the injury test "[w]ith respect to all United States countervailing duty *investigations* in progress concerning products of Mexico as of the date of entry into force of this Understanding . . . [emphasis added]." The term "investigation" is defined in section 355.6(b) of Import Administration's Countervailing Duty Regulations (19 CFR 355.6(b)) as the stage of a CVD proceeding *prior* to issuance of a CVD order. Thus, by the Understanding's own terms, it does not cover proceedings in which a CVD order has been published before April 23, 1985.

Since the Understanding constitutes the international obligation between Mexico and the United States and it specifies when the United States' obligation to grant the injury test begins, it would be contrary to the Understanding to argue the United States should grant an injury test for products which are no longer in the investigation stage. In light of the express limitation, the MFN argument is irrelevant.

Mexican government officials were told throughout the negotiations that DOC would not grant an injury test in cases in which orders had already been issued.

* * * *

I have confirmed that Mike Hathaway, Deputy General Counsel at USTR, agrees with my interpretation. (I drafted Article 5 and Mike was the principal USG negotiator).

A. R. Document No. 3 at 1-2.

Defendant also cites a memorandum dated March 13, 1986, by the Associate General Counsel of the Office of the United States Trade Representative's office (prior to March 13, 1986, the author was the Director of the ITA's Office of Policy), reconfirming his prior statement found in the October 4, 1985 memorandum. *See* A.R. Document No. 16. The Court observes these submissions by defendant lend some persuasive weight to defendant's argument.

While the Court recognizes "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight," *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1981), ITA regulations provide more persuasive support for the defendant's argument.

The definition of "investigations" found in these regulations provides that "[a]n 'investigation' refers to that time between the publication of a notice of initiation and the publication of the earliest of (1) a notice of termination, [sic] (2) a negative determination that has the effect of terminating the administrative proceedings; or (3) an Order." 19 C.F.R. § 355.6(b) (1985). A "determination" is defined as "an official decision in the course of a proceeding." 19 C.F.R. § 355.6(c) (1985). An "order" is further defined as "a notice issued following final determinations of subsidy and, when applicable, injury, which provides for the imposition of countervailing duties." 19 C.F.R. § 355.6(c) (1985). These definitions were published in the Code of Federal Regulations (Code) as of the time of negotiation and signing of the Understanding and existed in the Code verbatim for many years prior to that time. They, therefore, provided the background against which the Understanding between the United States and Mexico was negotiated.

Section 355.0 of Title 19 of the Code sets forth important preliminary information in regard to the scope and implementation of Part 355 dealing with countervailing duties:

> § 355.0 Scope. This part sets forth procedures and rules applicable to proceedings under section 303 and Title VII of the Tariff Act of 1930, as amended (19 U.S.C. 1303 *et*

seq.) (hereinafter referred to as "the Act") relating to the imposition of countervailing duties.

19 C.F.R. § 355.0 (1985).

It is clear the Code, in setting forth the procedures for imposing countervailing duties, provides that under section 303 and Title VII, the word "investigation" is limited to that period of time in a countervailing duty investigation which precedes the issuance of a countervailing duty order. For the purposes of the instant action, the Court therefore holds "investigations in progress" does not include the 751 reviews as plaintiff has argued. The Court further holds it was neither contrary to law nor unsubstantiated by evidence on the record, in light of the above analysis, for the ITA to determine it was not precluded from imposing countervailing duties upon the Mexican PHC entered in 1984 without an injury determination, prior to the signing of the Understanding. It was neither contrary to law nor unsubstantiated by evidence on the record for the ITA to determine it lacked authority to revoke the CVD order, on account of the Understanding, since the CVD order covered those goods entered during the 1984 751 review period—a period of time prior to the effective date of the Understanding.

The language of the Understanding also sheds light on the issues at hand and lends further persuasive support for denying plaintiff's assertion the Understanding affects the CVD order and entries of PHC before April 23, 1985. The opening clause of paragraph 5 of the Understanding concerning the injury test requirement provides: "[f]or the purposes of the *application* of countervailing measures." Paragraph 6 of the Understanding further provides, in pertinent part, as follows:

> 6. *DOMESTIC PROCEDURES AND LAW*
>
> *No provision of this Understanding shall be construed to prevent the United States from finally imposing countervailing duties pursuant to its national law* on products of Mexico receiving subsidies of any kind . . . .

Understanding at ¶ 6 (emphasis added).

The language of the Understanding directs the imposition of countervailing duties in accordance with United States national

law. Therefore, despite plaintiff's argument that the plain reading of the Understanding supports its position, the Court observes United States countervailing duty law is the source of direction and guidance in this matter.

The intent of the countervailing duty law is to impose duties on goods as they enter the United States and not to impose countervailing duties on a retroactive basis. *Cementos Guadalajara*, Slip Op. 88-48 at 43-44. Although the court in *Cementos Guadalajara* dealt with the ITA's challenged implementation of the countervailing duty law pursuant to 19 U.S.C. § 1303 under a similar fact pattern, the Court finds the analysis to have analogous application to the present situation dealing with the implementation of 19 U.S.C. § 1671. Here, as in *Cementos Guadalajara*, plaintiff challenges the imposition of countervailing duties without an affirmative injury determination on Mexican goods entered prior to the establishment of Mexico's status as "a country under the Agreement." Here, as in *Cementos Guadalajara*, the Court finds the actions of the ITA were supported by substantial evidence and otherwise in accordance with law when the ITA imposed countervailing duties and maintained the CVD order on PHC entered prior to Mexico's attaining "country under the Agreement" status. The ITA's decision not to revoke the CVD order, as it pertained to the review period in the second 751 review, was equally supported by the record and otherwise in accordance with law.

Plaintiff additionally claims "international obligations" of the United States require the ITC to undertake an injury investigation before countervailing duties can be imposed on the duty-free PHC from Mexico. Specifically, plaintiff charges that notwithstanding Mexico's status granted by the Understanding, Mexico's accession to the GATT in 1986 established an international obligation of the United States to provide an injury test on PHC from Mexico before countervailing duties could be imposed. Plaintiff contends: (1) the ITA's refusal to apply the GATT accession to the 1984 entries of PHC administratively reviewed during 1986; (2) the ITA's postponement of definitively making this decision; and (3) the ITA's refusal to state a basis for the above considerations, constitute reversible error.

Citing the Understanding at paragraph 8, plaintiff urges the Understanding grants Mexico a "most favored nation" status which requires the United States to extend to Mexican products treatment "no less favorable than that accorded to the products of other countries."

Plaintiff alludes to those occasions when the ITA revoked CVD orders on merchandise where the status of the goods changed after a CVD order was issued, but during a 751 review. In these cases, urges plaintiff, where there was no provision in the law for an injury determination at that point in the proceedings and the status change necessitated an injury determination before imposition of countervailing duties, the ITA revoked the CVD orders. *See, e.g., Carbon Steel Wire Rod From Trinidad and Tobago; Intention to Review and Preliminary Results of Changed Circumstances; Administrative Review and Tentative Determination to Revoke Countervailing Duty Order*, 50 Fed. Reg. 19561 (1985); and *Certain Fasteners From India; Final Results of Administrative Review and Partial Revocation of Countervailing Duty Order*, 47 Fed. Reg. 44129 (1982).

Finally, plaintiff maintains the ITA improperly failed to conduct a "changed circumstance" review pursuant to 19 U.S.C. § 1675(b). Plaintiff requested the review on October 29, 1986, more than one month prior to the publication of the final results of the second 751 review. Plaintiff claims Mexico's status change to a "country under the Agreement" was a "changed circumstance" and would have led the ITA to find the PHC was subject to an injury test and the ITA lacked authority to impose countervailing duties on the PHC without this test. Plaintiff believes the ITA had authority to conduct a "changed circumstance" review at the time of the second 751 review and publish this determination concurrently with the second 751 review results. Plaintiff charges the ITA even failed to respond to their request for review based on changed circumstances in the second 751 review results.

Defendant contends there were no "international obligations" between the United States and Mexico at the time of the issuance of the CVD order on PHC up to and including 1984 which would have required an injury test by the ITC before the ITA could impose countervailing duties on the PHC. Defen-

dant contends there were no international obligations despite any "most favored nation" treatment allegedly accorded Mexican goods.

Defendant contends the countervailing duty law does not provide for a retroactive application of, or a request for, an injury determination for goods entered prior to the attainment of "country under the Agreement" status. Because the merchandise at issue was entered before Mexico became a "country under the Agreement," defendant asserts the ITA's determination not to specifically conduct a separate "changed circumstances" review was proper.

The Court is not persuaded the Understanding required the ITA to grant an injury determination or revoke the CVD order on the PHC entered in 1984 before countervailing duties were imposed. Based on the analysis and reasoning set forth above, regarding Mexico's status as a "country under the Agreement" pursuant to the Understanding, and upon the analysis and reasoning in *Cementos Guadalajara*, the Court holds an affirmative injury determination was not required before the ITA could impose countervailing duties on PHC entered in 1984. The ITA's imposition of countervailing duties without an injury determination on the PHC entered in 1984, prior to the effective date of the Understanding, was supported by substantial evidence and was otherwise in accordance with law. Slip Op. 88-48 at 44.

Concerning plaintiff's "most favored nation" argument, the Court has held the Understanding does not provide retroactive application of the U.S. countervailing duty law to goods entered prior to the effective date of the Understanding. The PHC was entered in 1984, prior to the signing of the Understanding and prior to Mexico's attainment of "most favored nation" treatment for its goods.

The ITA determinations cited by plaintiff do not support plaintiff's arguments. These determinations involved cases where dutiable goods from a GATT member country were subject to a pre-existing CVD order. During the 751 reviews, the goods were given recognition by the United States as having changed to a duty-free status. In *Fasteners From India*, the ITA determined the goods, as newly established duty-free goods,

were entitled to the injury determination for goods entered *after* the status change. Because there was no authority in the statutes for the ITA to require an injury determination once a CVD order was issued and 751 reviews were proceeding, the ITA revoked the CVD order *as it pertained to those goods entered after the status change.*[18]

The two determinations, cited by plaintiff, would appear to support defendant's position to a greater extent than that of plaintiff. *See Cementos Guadalajara*, Slip Op. 88-48 at 43-44. In these determinations, the ITA decided to revoke the CVD orders *only* insofar as they pertained to goods entered *after* the date of the status change, and not retroactively to goods entered *before* the change.

Insofar as plaintiff's "changed circumstances" argument is concerned, the Court holds the ITA's determination concerning the 1984 PHC entries that predated the effective date of the Understanding and predated Mexico's accession to the GATT was supported by substantial evidence on the record and not contrary to law.

The applicable statute governing a request for a review due to "changed circumstances" is 19 U.S.C. 1675(b)(1). This section provides as follows:

> (b) Reviews upon information or request.—
>
> (1) In general.—Whenever the administering authority . . . receives information concerning, or a request for the review of, an agreement accepted under section 1671c of this title . . . or section 1673c of this title . . . or an affirmative determination made under section 1671c(h)(2), 1671d(a), 1671d(b), 1673c(h)(2), 1673d(a), 1673d(b), 1676a(a)(1), or 1676a(a)(2) of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register.

19 U.S.C. § 1675(b)(1) (1986).

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18 In the *Carbon Steel Wire* determination, the ITA has recognized the problem involved with the dutiable/duty-free change and issued a preliminary determination to revoke the order but has yet to issue a final revocation order.

Plaintiff alleges the ITA improperly failed to conduct a review pursuant to its request that the ITA revoke the CVD order due to "changed circumstances." Plaintiff's argument, however, is not persuasive. The ITA indicated it was "currently considering" whether the accession by Mexico to the GATT would affect future entries. Whether or not future entries will constitute sufficient grounds to satisfy the "changed circumstances" requirement will have to await the ITA's decision in the future. The ITA, as noted above, explicitly determined not to give retroactive effect to entries that predated the Understanding or Mexico's accession to the GATT.

The Court therefore holds the conclusion by the ITA that it lacked authority based upon the Understanding to revoke the CVD order as it pertained to the 1984 PHC and the ITA's conclusion that the Understanding excluded CVD orders existing prior to April 23, 1985, the effective date of the Understanding, are supported by substantial evidence on the record and are otherwise in accordance with law. The Understanding did not provide for the retroactive application of an injury determination prior to the effective date of the Understanding.

The Court further holds the determination by the ITA not to treat the PHC entered in 1984 as effectively retroactive on account of the accession of Mexico to the GATT on August 24, 1986 was supported by substantial evidence on the record and was otherwise in accordance with law. There is no provision in the U.S. domestic countervailing duty law or in the GATT providing for retroactive effect. *See Cementos Guadalajara*, Slip Op. 88-48.

Plaintiff also challenges the ITA's methodology in computing the value of the benefits plaintiff received from the FOMEX loans.[19] Plaintiff contends the ITA failed to compare the proper

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19 The FOMEX loans originated from a trust by the same name. The trust was:

> established by the government of Mexico to promote the manufacture and sale of exported products. During the period for which we are measuring benefits, the fund was administered by the Mexican Treasury Department with the Bank of Mexico acting as the trustee.

dollar benchmark with the ITA determined preferential interest rate received by plaintiff for loans under FOMEX. Plaintiff charges the ITA inappropriately used a Federal Reserve Board weighted-average interest rate to establish a national average benchmark rate and not a company-specific one as a benchmark in calculating the benefit. Plaintiff believes the proper choice as a benchmark should have been the published Mexican interbank rate (aceptaciones bancarias). In addition, plaintiff maintains the ITA improperly calculated the preferential rate on FOMEX export loans.

Defendant contends plaintiff's proposed rates were interbank rates for dollar loans and not average commercial lending rates. Defendant urges the ITA customarily uses a national average commercial benchmark as a model for comparison. According to the defendant, the ITA purposely sought a national average benchmark rate. 51 Fed. Reg. at 44501-02. Defendant maintains plaintiff's suggested rate alternatives for comparison were not considered by the ITA because they were not national average benchmark rates. Defendant further points out the ITA's policy of administering a national average commercial benchmark for the FOMEX loans was affirmed by the Court in *Alhambra Foundry v. United States*, 9 CIT 632, 635, 626 F. Supp. 402, 407 (1985).

Defendant agrees there may be some situations in which loans may vary from company to company, but here the potential variance of loans distributed among the companies was not of a sufficient enough magnitude to resort to a use of a company-specific commercial rate by the ITA. There was no indication, defendant continues, that plaintiff's alternatively

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Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker From Mexico, 48 Fed. Reg. 43063, 43065 (1983). FOMEX is a program that provided short-term loans to Mexican exporters, including plaintiff, at preferential rates of interest. The FOMEX loans consist of two different programs: pre-export loans, denominated in Mexican pesos for providing manufacturers with working capital; and export loans, denominated in dollars and requiring prepaid preferential interest.

suggested rates had included finance charges which thereby would constitute effective rates for the ITA to use.

It appears the ITA acted reasonably and in accordance with law in choosing comparison models for benchmark rates and in calculating that rate from the information gleaned from the Federal Reserve Board. It has been held where:

> the Court is confronted with two opposing, but substantial views of the record, it is not the ambit of the Court to choose the view which it would have chosen in a trial *de novo*. Rather, the Court must sustain the administering agency's view if it is supported by substantial evidence on the record and in accordance with law.

Hercules, Inc. v. United States, ____ CIT ____, ____, 673 F. Supp. 454, 479 (1987).

Plaintiff has raised some interesting points, but has not specifically pointed out in the record any information to substantiate its claim. Plaintiff has failed to show the ITA's determination regarding the FOMEX preferential rate was unreasonable or unlawful. Deference must be given to the agency's interpretation of the evidence on the record. Indeed, "[a]s long as the interpretation is sufficiently reasonable, it will be sustained. Furthermore, it need not be the only reasonable interpretation." *Id.* at 485-86 (referring to *Atcor, Inc. v. United States*, ____ CIT ____, ____, 658 F. Supp. 295, 299 (1987)). The Court therefore sustains the ITA's calculated value of the benefits received from the FOMEX loans as supported by substantial evidence and as otherwise in accordance with law.

Plaintiff's last challenge to the final results of the second 751 review concerns the ITA's use of a country-wide subsidy rate in the 751 review results rather than a company-specific assessment rate as calculated in the original final determination and CVD order. Plaintiff claims the ITA determined, in the affirmative final determination of the original CVD investigation, that the company-specific calculation rates were appropriate because the benefits received by the different Mexican companies under investigation were "materially different." 48 Fed. Reg. at 43068. For the subsequent first and second 751 reviews,

plaintiff contends the ITA inconsistently applied a country-wide rate.

Plaintiff urges the applicability of 19 C.F.R. § 355.33(f),[20] which existed at the time the challenged proceedings were conducted. Plaintiff refers to the language of 353.33(f) which provides: "such differences *shall* be estimated and stated." Plaintiff expresses additional concerns regarding the agency's exercise of discretion in its choice of methodology.

Defendant concedes the ITA altered its methodology from a company-specific subsidy calculation in the original determination to a country-wide subsidy calculation in the first and second 751 reviews. Defendant contends, however, the applicable law and the facts of the case warranted such a change. *See Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Administrative Review of Countervailing Duty Order*, 50 Fed. Reg. 51732, 51733-34 (1985); *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44500, 44502 (1986).

The applicable law pertaining to this issue is set forth at § 607 of the Trade and Tariff Act of 1984, 19 U.S.C. § 1671e(a)(2). Section 1671e(a)(2) provides as follows:

> § 1671e. Assessment of duty
>
> (a) Publication of countervailing duty order—Within 7 days after being notified by the Commission of an affirmative determination under section 1671d(b) of this title, the administering authority shall publish a countervailing duty order which—

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20 Section 355.33(f) sets forth:

> (f) *Contents of Final Determinations*. The Final Determination shall include conclusions with regard to all facts and issues of law considered material to the Determination. If the Determination is affirmative, the amount of the net subsidy shall be estimated and stated, and the nature of the subsidy determined. If separate enterprises have received materially different benefits, such differences shall be estimated and stated.

19 C.F.R. § 355.33(f) (1983).

* * * *

(2) shall presumptively apply to all merchandise of such class or kind exported from the country investigated, except that if—

(A) the administering authority determines there is a significant differential between companies receiving subsidy benefits, or

(B) a State-owned enterprise is involved,

the order *may provide for differing countervailing duties*

. . . .

19 U.S.C. § 1671e (a)(2) (1985) (emphasis added). It is clear, from the language of this provision, Congress has authorized the agency to exercise its discretion in providing for differing countervailing duties *if* the agency determines there is a significant differential between companies receiving subsidy benefits.

The record is clear from the final results of both the first and second 751 reviews the ITA determined there was no significant differential between the companies receiving the subsidy benefits. Having set forth this basis for its decision, *see* 50 Fed. Reg. at 51733-34, the ITA properly exercised its statutory discretion by not providing for significant differences in the countervailing duties for the separate companies.

Although defendant alludes to the additional administrative burden as well as the rise in the number of companies (from 5 to 8) as additional support for its decision not to apply a company-specific calculation rate, it appears from the language of the published final results and in the defendant's brief before the Court the ITA did in fact calculate the values for each specific company and made this data available for use. Nevertheless, the statute is clear the ITA *may* provide for differences *if* it determines there is a significant differential between the companies receiving the subsidy benefits. The ITA has therefore complied with the statutory mandate and has not reached a determination that is contrary to law. *See Ceramica Regiomontana, S.A. v. United States*, ____ CIT ____, ____, 636 F. Supp. 961, 968 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

Plaintiff has not provided any evidence in the record which supports its argument that the ITA's calculations were unsupported by substantial evidence or contrary to law. Furthermore, plaintiff's reliance on *Phillip Brothers, Inc. v. United States*, ____ CIT ____, 630 F. Supp. 1317 (1986), is misplaced. *Phillip Brothers* held, *inter alia*, that the ITA must *indicate* its *justification* for its change from a company-specific basis in a CVD order to an average assessment in the 751 reviews. The court, in *Phillip Brothers*, was concerned with the failure of the agency to articulate its reasons for the decision. *Id.* at 1322-23.

The ITA has thoroughly articulated its reasons for the change in calculation methodology, thus rendering the *Phillip Brothers* rationale inapplicable to the instant action. The ITA's decision to alter the methodology for calculating the rates was not contrary to law and was supported by substantial evidence on the record.

CONCLUSION

The Court has found, in accordance with the ITA's determination at 51 Fed. Reg. 44500 (1986), the entries of PHC subject to the second 751 review were not affected by Mexico's accession to the GATT since those goods were entered prior to accession. There is no provision in United States domestic countervailing duty law or in the GATT providing for retroactive effect. Therefore, the ITA acted in accordance with law and its determination was supported by substantial evidence in the record when it refused to revoke the CVD order as it applied to those goods covered in the second 751 review and assess countervailing duties on the PHC. By analogy to the Court's opinion, *Cementos Guadalajara*, Slip Op. 88-48, it was in accordance with law and was supported by substantial evidence in the record for the ITA to determine it lacked authority to revoke the CVD order due to the Understanding as it applied to goods covered by the same second 751 review.

The Court's holding, insofar as Mexico's accession to the GATT is concerned, does not apply to those goods subject to later 751 reviews and entered after 1984. The ITA will presum-

ably decide subsequent to the decision in this case what will be the effect of GATT accession upon those entries. Thereafter, court challenges may be made as to those goods subject to countervailing duties assessed under further successive 751 review results.

Based upon the discussion and legal reasoning set forth above, the Court denies plaintiff's motion, sustains the ITA's administrative review results challenged here and published at 51 Fed. Reg. 445 (1986), and enters judgment in favor of defendant.

The Court's order will be entered accordingly.

/s/ GREGORY W. CARMAN
Gregory W. Carman, Judge

Dated: New York, New York
June 9, 1988

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 86-12-01607

CEMENTOS ANAHUAC DEL GOLFO, S.A.,
Plaintiff,

—v.—

UNITED STATES,
Defendant.

Before: CARMAN,
Judge

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein, now, in conformity with said decision, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment is hereby denied and judgment is hereby entered for defendant; and it is

ORDERED, ADJUDGED and DECREED that the determination of the International Trade Administration is hereby sustained; and it is further

ORDERED, ADJUDGED and DECREED that this action is hereby dismissed.

/s/ GREGORY W. CARMAN
Gregory W. Carman, Judge

Dated: New York, New York
June 9, 1988.

APPENDIX C

ORDER OF REHEARING AND STAY OF MANDATE

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

88-1400, -1476

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., and CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiffs-Appellants,

—v.—

THE UNITED STATES and MALCOLM BALDRIDGE, SECRETARY OF COMMERCE,

Defendants-Appellees.

88-1502

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff-Appellee,

CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V. and CEMENTOS VERACRUZ, S.A. DE C.V.,

Plaintiffs,

—v.—

THE UNITED STATES and WILLIAM VERITY, SECRETARY OF COMMERCE,

Defendants-Appellants,

GIFFORD HILL & COMPANY, INC. and KAISER CEMENT CORPORATION,

Defendants.

ORDER

Before

RICH, *Circuit Judge*, NIES, *Circuit Judge*,
and NEWMAN, *Circuit Judge*.

A petition for rehearing having been filed in this case and an amicus curiae petition in support of the petition for rehearing having been filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on September 19, 1989.

FOR THE COURT

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Clerk

Dated: September 12, 1989

cc: JOSEPH S. KAPLAN
VELTA A. MELNBRENCIS
EUGENE T. ROSSIDES
IRWIN P. ALTSCHULER

CEMENTOS GUADALAJARA V US, 88-1400, -1476, -1502

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
September 12, 1989

FRANCIS X. GINDHART
Clerk

Note: This order has not been prepared for publication in a reporter.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

88-1400, -1476

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., and CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiffs-Appellants,

—v.—

THE UNITED STATES and MALCOLM BALDRIDGE, SECRETARY OF COMMERCE,

Defendants-Appellees.

88-1502

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff-Appellee,

CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V. and CEMENTOS VERACRUZ, S.A. DE C.V.,

Plaintiffs,

—v.—

THE UNITED STATES and WILLIAM VERITY, SECRETARY OF COMMERCE,

Defendants-Appellants,

GIFFORD HILL & COMPANY, INC. and KAISER CEMENT CORPORATION,

Defendants.

ORDER

A suggestion for rehearing in banc having been filed in this case, and a response thereto having been invited by the court and filed, and an amicus curiae petition in support of the response to the suggestion for rehearing in banc having been filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Clerk

Dated: October 19, 1989

cc: Joseph S. Kaplan
Velta A. Melnbrencis
Eugene T. Rossides
Irwin P. Altschuler

CEMENTOS GUADALAJARA V US, 88-1400, -1476, -1502

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
October 19, 1989

FRANCIS X. GINDHART
Clerk

Note: This order has not been prepared for publication in a reporter.

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

88-1400, -1476

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., CEMENTOS VERACRUZ, S.A., and CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiffs-Appellants,

—v.—

THE UNITED STATES and MALCOLM BALDRIDGE, SECRETARY OF COMMERCE,

Defendants-Appellees.

88-1502

CEMENTOS ANAHUAC DEL GOLFO, S.A.,

Plaintiff-Appellee,

CEMENTOS DE CHIHUAHUA, S.A., CEMENTOS GUADALAJARA, S.A. DE C.V., CEMENTOS MEXICANOS, S.A. DE C.V., CEMENTOS PORTLAND NACIONAL, S.A. DE C.V. and CEMENTOS VERACRUZ, S.A. DE C.V.,

Plaintiffs,

—v.—

THE UNITED STATES and WILLIAM VERITY, SECRETARY OF COMMERCE,

Defendants-Appellants,

GIFFORD HILL & COMPANY, INC. and
KAISER CEMENT CORPORATION,

Defendants.

Upon reading and filing the motion of plaintiffs-appellants in Appeal Nos. 88-1400 and 88-1476 and plaintiffs-appellees in Appeal No. 88-1502, and upon consideration of all other papers and proceedings in this action it is hereby

ORDERED that the motion be, and hereby is, granted and it is further

ORDERED that enforcement of the mandate issued on October 26, 1989 is stayed pending the filing of plaintiffs-appellants/plaintiffs-appellees petition for writ of certiorari to the Supreme Court of the United States and until the completion of proceedings before the Supreme Court.

/s/ GILES S. RICH
Circuit Judge

Dated: December 4, 1989

cc: Joseph S. Kaplan, Esq.
Velta A. Melnbrencis, Esq.
Eugene L. Stewart, Esq.
Irwin P. Altschuler, Esq.
Eugene T. Rossides, Esq.
Walter J. Spak, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
December 4, 1989

FRANCIS X. GINDHART
Clerk

APPENDIX D

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303, provides in pertinent part:

> (a)(1) Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title), whenever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produce in such country . . . . , then upon the importation of such article or merchandise into the United States . . . , there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.
>
> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there are affirmative determinations by the Commission under subtitle IV of this chapter; except that such a determination shall not be required by the international obligations of the United States.
>
> (b) The duty imposed under subsection (a) of this section shall be imposed, under regulations prescribed by the administering authority . . . , in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties) . . . .

Section 303, which contains the so-called "old" countervailing duty law, is contained in Chapter 4 of title 19, United States Code. Subtitle IV of Chapter 4 of title 19 contains sections 1671 through 1677g, which include the "new" countervailing and antidumping duty laws, which were enacted as part of the Trade Agreements Act of 1979, Pub. Law 96-39, 93 Stat. 144.

Section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671, provides in pertinent part:

> (a) General rule.—If—
>
> (1) the administering authority determines that—
>
> (A) a country under the Agreement . . .

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and

(2) the [United States International Trade] Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

(b) Country under the Agreement.—For purposes of this part, the term "country under the Agreement" means a country—

(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title,

(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President

. . . .

Section 2503(b) of title 19, United States Code, which is referred to in 19 U.S.C. § 1671(b), authorizes the President to accept trade agreements on behalf of the United States. It provides in its subsection (2) that no agreement accepted by the President "shall apply between the United States and any other country unless the President determines that such country—(a) has accepted the obligations of the agreement with respect to the United States, and (b) should not otherwise be denied the benefits of the agreement with respect to the United States because such country has not accorded adequate benefits,

including substantially equal competitive opportunities for the commerce of the United States . . . ."

United States Code, Title 19, § 1677a(d)(1)(D) states:

(d) Adjustments to purchase price and exporter's sales price

The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

* * * * *

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, ...

APPENDIX E

The General Agreement on Tariffs and Trade, Article VI, paragraph 5, states:

> [N]o contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry.

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-928

In the Supreme Court of the United States

OCTOBER TERM, 1989

CEMENTOS GUADALAJARA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
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15 pp

QUESTION PRESENTED

Whether, in this countervailing duty case involving subsidized cement products imported from Mexico in 1983 and 1984, the Department of Commerce was required to determine that the U.S. cement industry was being injured by the imports, although no applicable international agreement required an injury determination with respect to goods imported from Mexico at that time and a final countervailing duty order was issued before an international agreement required an injury determination with respect to Mexican goods.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-928

CEMENTOS GUADALAJARA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 879 F.2d 847. The opinion of the Court of International Trade in *Cementos Guadalajara* v. *United States* (Pet. App. B23-B58) is reported at 686 F. Supp. 335. The opinion of the Court of International Trade in *Cementos Anahuac del Golfo* v. *United States* (*Anahuac I*) (Pet. App. B1-B21) is reported at 687 F. Supp. 1558. The opinion of the Court of International Trade in *Cementos Anahuac del Golfo* v. *United States* (*Anahuac II*) (Pet. App. B60-B108) is reported at 689 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1989. A petition for rehearing was denied on September 12, 1989 (Pet. App. C2-C3). The petition for a writ of certiorari was filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After finding that Mexican cement companies had received subsidies, the Department of Commerce issued a final determination in 1983 that countervailing duties should be imposed on cement products imported into this country from Mexico. Commerce did not determine whether U.S. industry had been injured by the imports, since no such determination was required by applicable law. Petitioners, six Mexican companies that manufacture and export cement, challenge the countervailing duties imposed on the cement products that they exported to the United States in 1983 and 1984. They contend that a 1985 bilateral agreement between the United States and Mexico, and Mexico's accession to the General Agreement on Tariffs and Trade (GATT) in 1986—both of which call for a determination whether U.S. industry has been injured by subsidized imports before countervailing duties are imposed—apply retroactively to the cement imported in 1983 and 1984.

1. The GATT is an international agreement to which the United States became a signatory in 1947. Under the GATT and the statutes Congress has enacted governing international trade, the United States imposes countervailing duties on goods like cement products imported from a GATT signatory only after determining that they have been subsidized and that an industry in the United States is injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded by the imports. An injury determination is also required in the case of imports from a "country under the Agreement," which is a country that has signed the Subsidies Code, another international agreement entered into under the auspices of the GATT, or has assumed obligations equivalent to those imposed by the Subsidies Code. See 19 U.S.C. 1671(b). The imposition of countervailing duties from a "country under the Agreement" is governed

by Section 701 of the Trade Agreements Act of 1979, 19 U.S.C. 1671. The imposition of countervailing duties from all other countries is governed by Section 303 of the Tariff Act of 1930, 19 U.S.C. 1303. No injury determination is required with respect to goods imported from other countries.

The procedures for imposing countervailing duties are set forth at 19 U.S.C. 1671a-1671e. In response to a complaint by a domestic manufacturer, Commerce conducts an investigation to determine whether the imported goods are subsidized and, if appropriate, whether the domestic industry has been injured. If Commerce determines that a countervailing duty is warranted, it issues an order to that effect and directs the Customs Service to collect an estimated countervailing duty at the time the goods are imported. See 19 U.S.C. 1671e(a)(1); *Ambassador Division of Florsheim Shoe* v. *United States*, 748 F.2d 1560, 1562-1563 (Fed. Cir. 1984). An importer may challenge a countervailing duty order by filing a complaint in the United States Court of International Trade within 30 days after the order was issued. 19 U.S.C. 1516a(a)(2).

Countervailing duty orders are reviewed periodically under Section 751 of the 1979 Trade Act, 19 U.S.C. 1675, and the amount of the countervailing duty is finally determined as a result of the review. See *Ambassador Division of Florsheim Shoe* v. *United States*, *supra*. Thus, after a review, an adjustment is made if the estimated countervailing duty collected at the time of importation is not the same as the countervailing duty ultimately determined to be due. In addition, the estimated countervailing duty collected at the time goods are imported is revised in light of the review.

2. In March 1983, the U.S. cement industry alleged that manufacturers of Mexican cement had received subsidies warranting the imposition of countervailing duties. After investigating the charge, Commerce determined that the

government of Mexico had subsidized four of the five known producers of cement products exported to the United States. It also concluded that no injury determination was required. Commerce directed the Customs Service to require petitioners to pay, at the time their cement entered the United States, estimated countervailing duties based on the amount of the subsidies paid by the Mexican government in 1982. No interested party sought judicial review of this countervailing duty order, which was issued in September 1983. Pet. App. B62-B64.

Commerce subsequently conducted two periodic reviews pursuant to Section 751. The first review, completed in December 1985, covered the second half of 1983 and determined the amount of the subsidy provided to each of the cement manufacturers during that period. As a result of that review, adjustments were made to reflect the differences between the amount of the subsidies determined to have been received in the second half of 1983 and the amount of the countervailing duties actually collected by the Customs Service at that time. Pet. App. B66-B67.

While the first administrative review was pending, the United States and Mexico signed a bilateral agreement, the *Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties* (Apr. 23, 1985). As a result of the Understanding, Mexico was designated a "country under the Agreement," so that countervailing duties would be imposed only after a finding of injury to U.S. industry. Paragraph 5 of the Understanding specified that an injury test was required where "countervailing duty investigations" were "in progress" at the time the Understanding took effect. Commerce determined that no injury test was required as part of the first administrative review, however, because the investigation

leading to the 1983 countervailing duty order had been completed and a final order had been issued. Commerce noted that it had "confirmed with the U.S. negotiators that their intention was to exclude application of [the] Understanding to pre-existing orders." 50 Fed. Reg. 51,736 (1985) (quoted at Pet. App. B68).

A second administrative review was conducted covering cement products imported in 1984. In August 1986, while that review was in progress, Mexico became a formal contracting party to the GATT. Pet. App. B69. Contrary to petitioners' request, Commerce determined that no injury test was required as part of its second review. It explained that "[s]ince Mexico's accession was effective on August 24, 1986," it did "not affect entries covered by this review, which extends only through December 31, 1984." 51 Fed. Reg. 44,500-44,501 (1986) (quoted at Pet. App. B71-B72).

3. Petitioners challenged the administrative reviews in the Court of International Trade. With respect to the first review, which covered the second half of 1983, Judge Aquilino concluded that Commerce had erred by failing to determine whether the imported products had injured the U.S. cement industry. Pet. App. B1-B22. He concluded that the change in Mexico's status resulting from the 1985 Understanding between the United States and Mexico "altered the status of the merchandise emanating therefrom insofar as imposition of those [countervailing] duties was concerned." *Id.* at B8.

Petitioners brought two separate challenges to the second review, which covered 1984, and both were decided by Judge Carman. Contrary to Judge Aquilino, he concluded that Commerce had properly refused to conduct an injury determination. Pet. App. B23-B59, B60-B109. With respect to the effect of the 1985 Understanding between the United States and Mexico, Judge Carman noted that while the Understanding applied to "investigations" in progress at the

time it was signed, the applicable regulations defined "investigation" as the "time between the publication of a notice of initiation and * * * an Order." *Id.* at B96 (quoting 19 C.F.R. 355.6(b)). He held that "the word 'investigation' is limited to that period of time in a countervailing duty investigation which precedes the issuance of a countervailing duty order," and does not include periodic reviews pursuant to Section 751. Pet. App. B97.

With respect to Mexico's accession to the GATT in 1986, Judge Carman noted that in prior cases Commerce had decided to revise countervailing duty orders in light of entry into the GATT "*only* insofar as they pertained to goods entered *after* the date of the status change, and not retroactively to goods entered *before* the change." Pet. App. B101. He held that "[t]here is no provision in the U.S. domestic countervailing duty law or in the GATT providing for retroactive effect." *Id.* at B102.

The court of appeals affirmed the decision upholding Commerce's decision "on the basis of Judge Carman's opinion." Pet. App. A3. It reversed Judge Aquilino's decision "because it is based upon reasoning and analysis which conflicts with Judge Carman's opinions which we have adopted." *Ibid.*

ARGUMENT

1. Petitioners contend that an injury determination was required in the case of cement products imported from Mexico in 1983 and 1984, even though Mexico was not a "country under the Agreement" until 1985 and did not join the GATT until 1986. They contend that the 1985 Understanding applies because the countervailing duty investigation was still "in progress," in their view—even though a final determination had been issued in 1983—since the periodic reviews had not been completed when the 1985 Agreement was signed. With respect to the GATT, peti-

tioners claim that Section 303(a)(2) of the Tariff Act of 1930 compels the conclusion that an injury test was required because, in their view, the countervailing duties for 1984 were not "imposed" until the periodic review was completed.[1] 19 U.S.C. 1303(a)(2).

Contrary to petitioners' contentions, review of the procedures set out in 19 U.S.C. 1671a through 1671e supports the court of appeals' decision. Under Section 1671b(b)(1), a "preliminary determination" as to whether to impose a countervailing duty must be made within 85 days after a complaint is filed. In this case, the preliminary determination was made on July 1, 1983. Pet. App. B63. A "final determination" must then be made under Section 1671d(a)(1) within 75 days of the preliminary determination. In this case, the final determination was issued on September 21, 1983, and was not appealed. Pet. App. B64. As a result of the preliminary and final determinations, the Customs Service collected estimated countervailing duties at the time cement was imported from Mexico in the second half of 1983 and in 1984. Since the final countervailing duty order was issued before Mexico became a "country under the Agreement" and the goods were imported before Mexico joined the GATT, no injury determination was required by Section 303.

That conclusion is not altered by the fact that periodic reviews pursuant to Section 751 were pending when Mexico and the United States entered into the 1985 Understanding. As Judge Carman explained (Pet. App. B96-B97), the countervailing duty investigation had been completed and

---

[1] Section 303(a)(2) states that "duties may be imposed under this section only if there are affirmative determinations [of injury]; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States." 19 U.S.C. 1303(a)(2).

the "final determination["] that countervailing duties should be collected had been made before the Understanding was signed. While the signatories agreed that the Understanding would apply to pending investigations, they intended that to mean investigations where a final determination had not been made under Section 1671d.

Analysis of Section 102 of the Trade Agreements Act of 1979, 19 U.S.C. 1671 note, supports that conclusion. That provision deals with investigations that are pending at the time that a country becomes a "country under the Agreement."[2] Section 102(a)(2) states that "[i]f the Secretary has made a preliminary determination under such section 303 * * *, but not a final determination, * * * he shall terminate the investigation under such section 303 * * * and the matter previously under investigation" shall be subject to Section 701 of the 1979 Trade Act, 19 U.S.C. 1671. Thus, if a final determination has *not* been made under Section 303 when a country becomes a "country under agreement," then the investigation is transformed into a Section 701 investigation, which requires an injury determination. But if a final determination has been made, no injury determination is required. In this case, the final determination in the Section 303 proceeding was made on September 21, 1983 (Pet. App. B64)—that is, before Mexico became a "country

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[2] As reprinted at 19 U.S.C. 1671 note, the provision is entitled "Investigations Pending on Jan. 1, 1980" (the date the 1979 Trade Act became effective), but its actual title is simply "Pending Investigations" (see 93 Stat. 189). It is clear that the provision governs cases where a country attains the status of a "country under the Agreement" after January 1, 1980, since the provision governs investigations pending "on the effective date of the application of * * * [Section 701] to imports from a country," and Section 701 applies when a country becomes a "country under the Agreement."

under the Agreement"—so no injury determination was required.

Nor was an injury determination required as part of the second review because Mexico became a member of the GATT in 1986. As Judge Carman explained (Pet. App. B101-B102), it has always been understood that the GATT's application depends on when particular goods are actually imported. See *V. Mueller & Co.* v. *United States*, 115 F.2d 354, 361 (C.C.P.A. 1940). That interpretation of the effect of accession to the GATT is sensible, as there is no good reason why becoming a contracting party to the GATT in 1986 should affect imports in 1983 and 1984. Periodic review under Section 751 is merely a method of assessing the actual amount of duties previously incurred under a countervailing duty order. Since petitioners imported subsidized cement products into the United States in 1983 and 1984, before Mexico was a member of the GATT, they incurred liability for countervailing duties, which are paid by importers, at that time whether or not the domestic cement industry was injured.

2. Petitioners contend (Pet. 6) that review is warranted because the decision below "will cause lasting confusion here and abroad regarding the United States' tariff policies on goods imported from GATT trading partners." There is no merit to that contention. The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade (28 U.S.C. 1295(a)(5)), so its decision in this case controls.[3]

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[3] Petitioners contend (Pet. 9-10) that the government's position in this case is contrary to the government's position in *Serampore Industries Pvt., Ltd.* v. *United States Department of Commerce, International Trade Administration*, 675 F. Supp. 1354 (C.I.T. 1987). We see no inconsistency. *Serampore* was a dumping case—that is, the importer was alleged to have sold goods in the United States at less than their fair value—and the dumping statute requires Commerce to

Moreover, the decision below merely restates the established principle that the GATT applies to goods imported after the date on which a country accedes to the Agreement. In addition, the application of that principle has a narrow scope. It only applies where a final countervailing duty order was issued under Section 303 with respect to certain goods before a country joined the GATT, and even then only where a periodic review is in progress with respect to goods imported before the country joined the GATT. Furthermore, since there are very few industrial, market economies not yet subject to the GATT (see Zeller, *Countertrade, the GATT, and the Theory of the Second Best*, 11 Hastings Int'l & Comp. L. Rev. 247, 266 n.137 (1988)) and the countervailing duty law does not apply to countries with nonmarket economies (*Georgetown Steel*

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calculate the "United States price" of the goods at issue in determining whether goods were dumped. In making that calculation, 19 U.S.C. 1677a(d)(1)(D) provides that Commerce must increase the United States price by the amount of any countervailing duty imposed on the merchandise. Commerce does not use the amount of the countervailing duty collected at the time of importation to determine the United States price (which petitioners contend is inconsistent with Commerce's position in this case), since the amount of the countervailing duty that is actually imposed following a periodic review may differ from the amount collected at the time of importation. In *Serampore*, the Court of International Trade upheld that approach, finding no indication "that Congress intended that Commerce adjust [the United States price] upwards for countervailing duty cash deposits, rather than countervailing duties actually imposed or assessed" following a periodic review. 675 F.Supp. at 1359. That reasonable conclusion is not contrary to the conclusion of the court below that the effect of the GATT on the countervailing duty collected on imported goods depends on the date the goods were imported rather than the date the relevant periodic review was concluded. In any event, any inconsistency is a matter for consideration by the Federal Circuit, not this Court.

Corp. v. *United States*, 801 F.2d 1308, 1313-1314 (Fed. Cir. 1986)), the effect of accession to the GATT is not likely to be a recurring issue in the near future.

No question relating to the effect of the 1985 Understanding between the United States and Mexico—the sole basis for Judge Aquilino's decision—warrants review by this Court. Whether Judge Carman and the court below correctly determined that the negotiators intended that agreement to require injury determinations only where a final determination had not yet been issued under Section 1671d is a fact-bound question of no general importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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